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THE ITALIAN ENLIGHTENMENT AND THE AMERICAN REVOLUTION: CESARE BECCARIA'S FORGOTTEN INFLUENCE ON AMERICAN LAW

John D. Bessler[‡]

Abstract

The influence of the Italian Enlightenment—the *Illuminismo*—on the American Revolution has long been neglected. While historians regularly acknowledge the influence of European thinkers such as William Blackstone, John Locke and Montesquieu, Cesare Beccaria's contributions to the origins and development of American law have largely been forgotten by twenty-first century Americans. In fact, Beccaria's book, *Dei delitti e delle pene* (1764), translated into English as *On Crimes and Punishments* (1767), significantly shaped the views of American revolutionaries and lawmakers. The first four U.S. Presidents—George Washington, John Adams, Thomas Jefferson and James Madison—were inspired by Beccaria's treatise and, in some cases, read it in the original Italian. *On Crimes and Punishments* helped to catalyze the American Revolution, and Beccaria's anti-death penalty views materially shaped American thought on capital punishment, torture and cruelty. America's foundational legal documents—the Declaration of Independence, the U.S. Constitution, and the U.S. Bill of Rights—were themselves shaped by Beccaria's treatise and its insistence that laws be in writing and be enforced in a less arbitrary manner. John Adams, Thomas Jefferson, James Madison and Benjamin Franklin studied Italian and read or spoke the language to one degree or another, and many early Americans also had a fascination with Italian history and the civil law. Though *On Crimes and Punishments* is focused largely on the criminal law, the U.S. Constitution and its Bill of Rights—written documents protecting individual rights—echo the Beccarian idea of a fixed code of laws. Not only did leading figures of the Italian Enlightenment mold Beccaria's work, but Beccaria's treatise—now more than 250 years old—influenced a whole host of European and American thinkers, from Jeremy Bentham to Gaetano Filangieri and from James Wilson to Dr. Benjamin Rush. Beccaria's ideas on government and the criminal justice system thereby profoundly shaped American law.

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I. INTRODUCTION

On Crimes and Punishments, written by the Italian criminal-law theorist Cesare Beccaria (1738-1794), was first published in Italian in 1764 as *Dei delitti e delle pene*.¹ It called for proportion between crimes and punishments, opposed both torture and capital punishment, and quickly became a runaway bestseller.² The treatise brought Beccaria, just 26 years old when he wrote it, considerable celebrity and fame. He was invited to Paris to be toasted by the French *philosophes* for his literary achievement, and he was asked by Catherine II to travel to Russia to help modernize that country's laws.³ Having read Beccaria's book around 1769, when he was admitted to the bar, Jeremy Bentham—the British philosopher who made penal reform his life's work—was so taken with the book that he wrote of Beccaria: “Oh, my master, first evangelist of Reason... you who have made so many useful excursions into the path of utility, what is there left for us to do?” “When Beccaria came,” Bentham wrote in *A Fragment on Government*, “he was received by the intelligent as an Angel from heaven would be by the faithful.” “He may be styled the father of *Censorial*

¹ JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* 3 (Durham, NC: Carolina Academic Press, 2014).

² ROBIN HEALEY, *ITALIAN LITERATURE BEFORE 1900 IN ENGLISH TRANSLATION: AN ANNOTATED BIBLIOGRAPHY* 253 (Toronto: University of Toronto Press, 2011); AARON THOMAS, ED., AARON THOMAS & JEREMY PARZEN, TRANS., CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* 17, 26, 32-34, 51, 55-56 (Toronto: University of Toronto Press, 2008).

³ JOHN HOSTETTLER, CESARE BECCARIA: *THE GENIUS OF ‘ON CRIMES AND PUNISHMENTS’* 31, 57 (Hampshire, UK: Waterside Press, 2011).

Jurisprudence,” Bentham added, taking stock of the Italian philosopher’s critical view of then-existing laws—laws full of inhumane and draconian punishments.⁴

In Europe today, Cesare Beccaria—an economist who has been called the “Italian Adam Smith”⁵—is still widely celebrated as an important historical figure. In Parma, Italy, where, starting at the tender age of eight, Beccaria attended the Collegio Farnesiano Jesuit school, the university’s library still has many old and new editions of *Dei delitti e delle pene*. At the University of Parma, early editions of Beccaria’s treatise, first published anonymously for fear of persecution, date back to the 1760s and the era of the Inquisition; one whole book even memorializes the building of a monument to Beccaria—a marble sculpture installed in central Milan more than a hundred years after the first appearance of his treatise.⁶ In 2014, the University of Parma hosted a symposium in honor of

⁴ MARILYN MCSHANE & FRANK P. WILLIAMS III, EDS., *CRIMINAL JUSTICE: CONTEMPORARY LITERATURE IN THEORY AND PRACTICE* 24 n.7 (New York: Garland Publishing, 1997); BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 48; Jeremy Bentham, *A Fragment on Government; Being an Examination of What Is Delivered, on the Subject of Government in General, in the Introduction to Sir William Blackstone’s Commentaries* (1776), *reprinted in* F. C. MONTAGUE, ED., *JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT* 105 n.2 (Union, NJ: The Lawbook Exchange, 2001).

⁵ LARS MAGNUSSON, *MERCANTILISM: THE SHAPING OF AN ECONOMIC LANGUAGE* 199 (London: Routledge, 2002); RICHARD F. TEICHGRAEBER, “FREE TRADE” AND MORAL PHILOSOPHY: RETHINKING THE SOURCES OF ADAM SMITH’S *WEALTH OF NATIONS* 199 (Durham, NC: Duke University Press, 1986); *see also* LUIGI COSSA, *AN INTRODUCTION TO THE STUDY OF POLITICAL ECONOMY* 167, 279 (London: Macmillan and Co., Louis Dyer, trans. 1893) (noting that Beccaria published *Elementi di economia pubblica* (1769) and that Beccaria “wrote lectures on economics (1769-70), which remained unpublished until 1804”).

⁶ AMATO AMATI & ANTONIO BUCCELLATI, *CESARE BECCARIA: L’ABOLIZIONE DELLA PENA DI MORTE* 315-17 (Milano: Francesco Vallardi, ed., 1872). Professor Amato Amati, of Milan, was a member of the commission that raised funds and supported the memorial to Cesare Beccaria’s life that can still be found in Milan. That commission included Italians from all over Italy, from Milan, Cremona, Pavia, Torino, Pisa and Naples, to Florence, Bologna, Caprera and San Fiorano. The commission also had supporters in European cities such as London, Paris, Berlin, and Heidelberg. *Id.* Although Giuseppe Grandi’s 1871 marble statue of Cesare Beccaria was damaged, a

the 250th anniversary of the book's publication.⁷ A widely read eighteenth-century text, quickly translated into French, English, German and Russian, as well as Spanish, Swedish and an array of other languages, Beccaria's book fundamentally re-shaped the law, changing hearts and minds on the subject of cruelty in the process.⁸

Beccaria's importance to the law's development is evident throughout modern-day Italy. At the University of Pavia, a few miles from Parma and where Beccaria received his law degree in 1758,⁹ another academic conference—one of many throughout Europe celebrating the 250th anniversary of the publication of *Dei delitti e delle pene*—also took place in 2014.¹⁰ A sculpted, stone bust of Beccaria, situated amongst some of his Enlightenment era peers, is found in the sprawling gardens adjoining Rome's Villa Borghese.¹¹ In Milan—the city of Beccaria's birth and the place of his death—the depth of admiration for its native

1914 bronze replica was put its place—and this stands today in the Milanese piazza named for Beccaria. HOSTETTLER, CESARE BECCARIA, *supra* note 3, at 33.

⁷ CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* lxvii (New Brunswick, NJ: Transaction Publishers, Graeme R. Newman & Pietro Marongiu, eds. & trans., 5th ed. 2009); THOMAS, ED., *ON CRIMES AND PUNISHMENTS*, *supra* note 2, at xxix.

⁸ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 431.

⁹ HOSTETTLER, CESARE BECCARIA, *supra* note 3, at 22.

¹⁰ Beccaria 2.5: Convegno Internazionale a 250 Anni Dalla Prima Edizione Di *Dei Delitti e Delle Pene* (23 e 24 Ottobre 2014 - Milano), *available at* file:///Users/johnbessler/Downloads/22087man_cesarebeccar.pdf. In anticipation of the 250th anniversary of the publication of *Dei delitti e delle pene*, the University of Geneva, in Switzerland, also hosted a multi-day conference on Beccaria's book and Cesare Beccaria's legacy. Cesare Beccaria: Reception et Heritage, Feb. 21-23, 2013, <http://www.unige.ch/lettres/istge/hmo/Colloques/ColloqueBeccaria2013.html>

¹¹ PAOLA DELLA PERGOLA, *VILLA BORGHESE 64* (Istituto Poligrafico Dello Stato/Libreria Dello Stato, 1964). Beccaria's bust in the gardens adjoining the Villa Borghese is not far from the bust of his Italian mentor Pietro Verri; Vittorio Alfieri, an Italian poet who wrote about America's independence; and Gaetano Filangieri, the author of a once popular treatise, *The Science of Legislation*, inspired in part by Beccaria's *On Crimes and Punishments* and of which Benjamin Franklin was a particular fan. BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 132-36.

son, the founder of modern criminology, is particularly strong. A large marble statue of Beccaria is found at one of the city's premier museums, the Pinacoteca di Brera, a museum that also houses paintings by Bellini, Raphael and Caravaggio.¹² Beccaria is depicted reclining in a chair holding a stone tablet, a copy of *Dei delitti e delle pene*, with his other notable writings, essays on public economy and style, at his feet.¹³ Across town, not far from Milan's famous Duomo, one of the largest cathedrals in the world,¹⁴ is the Piazza Cesare Beccaria, dedicated to Beccaria's memory in the nineteenth century and not far from where Beccaria and his friends used to drink coffee and debate the issues of the day.¹⁵ With a street named in his honor running by it, Piazza Beccaria—on the spot once occupied by the hangman's house—features the Milanese monument erected in Beccaria's memory. The massive stone pedestal on which the large bronze statue of Beccaria stands showcases a quote from *Dei delitti e delle pene*.¹⁶

"If you are visiting Milan," two Italian scholars note, "you will discover that 'Cesare Beccaria' is a Milanese household name." As that 2014 article on Beccaria emphasizes of the Italian thinker's ubiquitous presence in Milan: "Walking through the streets downtown—in an area familiar to shoppers—is Cesare Beccaria Square, and everyone has heard of the high school, or of the juvenile prison, named after this illustrious citizen of the past." "We have not

¹² *The Marriage of the Virgin* by Raphael (c. 1504); *Madonna and Child Blessing* by Giovanni Bellini (c. 1510); *Supper at Emmaus* by Caravaggio (1606).

¹³ THE BRERA GALLERY: THE OFFICIAL GUIDE 10 (Milan: Touring Club Italiano, 1998).

¹⁴ FODOR'S SEE IT ITALY 127 (Fodor's Travel Publications, 3d ed. 2009).

¹⁵ D. MEDINA LASANSKY, *THE RENAISSANCE PERFECTED: ARCHITECTURE, SPECTACLE, AND TOURISM IN FASCIST ITALY* 29 (University Park, PA: The Pennsylvania State University Press, 2004)

¹⁶ HOSTETTLER, *CESARE BECCARIA*, *supra* note 3, at 33.

forgotten Beccaria's name," University of Milan professor Mario Ricciardi and Italian scholar Filippo Santoni de Sio emphasize, "and indeed we associate it with the struggle for justice and humanity in punishment that was one of the dominant themes of the Enlightenment." Beccaria and his friends, they note of a Milanese group, the Accademia dei Pugni, "were depicted by Antonio Perego in a painting which nicely captures the atmosphere of the meetings of the 'Coterie' of Milan." As Ricciardi and his colleague describe Perego's painting: "Seated at a table, on the left of the painting, Alessandro Verri and Cesare Beccaria sit facing each other; the first writes and the second records (and he seems so absorbed as not even [to] notice what is happening around him). On the other side of the room Luigi Lambertenghi and Pietro Verri, also seated, are playing backgammon."¹⁷

Sadly, in twenty-first century America, Beccaria's influence on American law—and that of the Italian Enlightenment more broadly—has largely been forgotten. This is true even though the French Enlightenment's impact on early American law remains well known by most U.S. lawyers and judges. A lot of that probably has to do with the fact that Beccaria's name does not appear in any of *The Federalist Papers*, while Montesquieu's name appears in four—*No. 9*, *No. 43*, *No. 47* and *No. 78*. Alexander Hamilton referred to Montesquieu four separate times in *Federalist No. 9* in discussing republicanism and confederate republics,¹⁸ with James Madison—in *Federalist No. 43*—bringing up

¹⁷ Mario Ricciardi & Filippo Santoni de Sio, *Cesare Beccaria: Utilitarianism, Contractualism and Rights*, 2 PHILOSOPHICAL INQUIRIES 79, 79-86 (2014).

¹⁸ "Publius" [Alexander Hamilton], "The Union as a Safeguard Against Domestic Faction and Insurrection," available at http://thomas.loc.gov/home/histdox/fed_09.html. "Publius" was the pseudonym under which Alexander Hamilton, James Madison, and John Jay authored *The Federalist Papers*. *The Federalist Papers* were published

Montesquieu's name two times, also in the context of discussing confederate republics.¹⁹ In *Federalist No. 47*, Madison refers to Montesquieu by name five additional times. As regards the idea that "the three great departments of power should be separate and distinct," Madison wrote, speaking of legislative, executive and judicial powers, "[t]he oracle who is always consulted and cited on this subject is the celebrated Montesquieu."²⁰ In *Federalist No. 78*, Hamilton—in discussing the judiciary—also cites "[t]he celebrated Montesquieu."²¹ Beccaria, though once on the tip of every founder's tongue—is left out in the cold, though Beccaria's writings were hugely influential in both Europe and America. Victor Hugo once wrote that "Montesquieu engendered Beccaria" and that the writings of Beccaria and Montesquieu are, in fact, "closely connected."²²

The writers, poets, scientists and philosophers of the Italian Enlightenment were once celebrated in the Anglo-American world.²³ Unlike Italian thinkers such as Beccaria and Filangieri who have fallen into relative obscurity, however,

variously in three New York newspapers—the *Independent Journal*, the *New-York Packet*, and the *Daily Advertiser*—from October 27, 1787, through August 13, 1788." V. James Strickler, "Constitutional Cassandra: The Prophetic Fears of Brutus, the Anti-Federalist," in ANTHONY A. PEACOCK, ED., *FREEDOM AND THE RULE OF LAW* 93 n.2 (Lanham, MD: Lexington Books, 2010).

¹⁹ "Publius" [James Madison], "The Same Subject Continued: The Powers Conferred by the Constitution Further Considered," http://thomas.loc.gov/home/histdox/fed_43.html.

²⁰ "Publius" [James Madison], "The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts," http://thomas.loc.gov/home/histdox/fed_47.html.

²¹ "Publius" [Alexander Hamilton], "The Judiciary Department," http://thomas.loc.gov/home/histdox/fed_78.html.

²² VICTOR HUGO, *CLAUDE GUEUX: THE LAST DAY OF A CONDEMNED MAN* 108 (New York: Carleton, 1869).

²³ 4 *THE LONDON MAGAZINE: JANUARY TO APRIL, 1826*, at 386 (London: Hunt and Clarke, 1826) (listing notable Italian "Poets," "Profound Scholars," and figures in "Mathematics" and "Natural Philosophy, History, Medicine, &c." as well as the following figures in "Laws and Politics": "Beccaria, Filangeri, Galiani, Genovesi, Paruta, Pagano, Verri, (the three brothers Vico)").

the influence of French, Scottish, Swiss and English writers remains well known today by American scholars and historians.²⁴ Many modern-day American lawyers still know the names of Sir Edward Coke and Sir William Blackstone, and Enlightenment figures such as John Locke, David Hume, Francis Hutcheson and Jean-Jacques Rousseau get plenty of attention in sources discussing American constitutional law.²⁵ But Americans are much less likely to recognize the name Cesare Beccaria or, say, the names of Luigi Castiglioni or Philip Mazzei—the latter an Italian immigrant who came to America to start a vineyard near Jefferson’s Monticello, befriending a vast array of Founding Fathers in the process. Castiglioni, a botanist from Milan in Beccaria’s social circle, traveled

²⁴ DENA GOODMAN, *THE REPUBLIC OF LETTERS: A CULTURAL HISTORY OF THE FRENCH ENLIGHTENMENT* (Ithaca, NY: Cornell University Press, 1994); ROBERT W. GALVIN, *AMERICA’S FOUNDING SECRET: WHAT THE SCOTTISH ENLIGHTENMENT TAUGHT OUR FOUNDING FATHERS* (Lanham, MD: Rowman & Littlefield, 2002); ARTHUR HERMAN, *THE SCOTTISH ENLIGHTENMENT: THE SCOTS’ INVENTION OF THE MODERN WORLD* (London: Fourth Estate, 2003).

²⁵ See MARY SARAH BILDER, MAEVA MARCUS & K. KENT NEWMYER, EDS., *BLACKSTONE IN AMERICA: SELECTED ESSAYS OF KATHRYN PREYER* (Cambridge: Cambridge University Press, 2009) (discussing Blackstone’s influence in America); JAMES A. CURRY, RICHARD B. RILEY & RICHARD M. BATTISTONI, *CONSTITUTIONAL GOVERNMENT: THE AMERICAN EXPERIENCE* 32 (Dubuque, IA: Kendall/Hunt Publishing Co., 5th ed. 2003) (“Seventeenth century jurist Sir Edward Coke contributed significantly to American constitutionalism.”); LEO DAMROSCH, *JEAN-JACQUES ROUSSEAU: RESTLESS GENIUS* 1 (New York: First Mariner Books, 2007) (“Rousseau’s triumph was the more surprising since, unlike most famous writers then or later, he did not go to school for a single day and was essentially self-taught. In a series of amazingly original books, of which *The Social Contract* is the best known, he developed a political theory that deeply influenced the American Founding Fathers and the French revolutionaries”); ALEXANDER LESLIE KLIEFORTH & ROBERT JOHN MUNRO, *THE SCOTTISH INVENTION OF AMERICA, DEMOCRACY AND HUMAN RIGHTS: THE HISTORY OF LIBERTY AND FREEDOM FROM THE ANCIENT CELTS TO THE NEW MILLENNIUM* 269 (Lanham, MD: University Press of America, 2004) (“James Madison and James Wilson . . . were principal co-authors of the Federal Constitution of 1787. Both men were schooled in the Scottish Enlightenment and greatly influenced by David Hume who in turn was influenced by Francis Hutcheson.”); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 12, 27, 41, 280 (New York: Random House, 2006) (discussing John Locke and Montesquieu); SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 80, 86, 196-97, 317, 356, 358-59, 362, 369 (Oxford: Oxford University Press, 2012) (discussing David Hume, John Locke and Montesquieu).

extensively throughout North America right before the 1787 Constitutional Convention in Philadelphia—a kind of Alexis de Tocqueville (only decades *before* de Tocqueville) who, after meeting a who's who of American leaders, wrote his own travelogue of American life.²⁶

Although once celebrated by America's founders,²⁷ in early American verse,²⁸ and by eighteenth- and nineteenth-century death penalty opponents,²⁹ Cesare Beccaria's name is now missing from the pages and indexes of many

²⁶ From time to time, U.S. scholars do bring up Beccaria's writings—along with those of other Enlightenment authors—but mostly in the context of contentious disputes over the Second Amendment's meaning. *E.g.*, Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HISTORY REV. 161, 162 (2004) (“The key to understanding this lost context of the Second Amendment resides in the writings of thinkers such as James Burgh, who distilled the history of Scotland into a potent tonic for the Founders, reminding them of the dangers of allowing the militia to be disarmed by a distant and powerful government. Burgh's thought has not figured prominently in recent writing on the Second Amendment by gun rights advocates who have been more enamored of the Italian Enlightenment theorist Cesare Beccaria who attacked laws that prohibited individuals from carrying guns and argued that such laws benefited criminals.”).

²⁷ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 151-218.

²⁸ The Yale-educated and Massachusetts native St. John Honeywood wrote a whole poem titled “Crimes and Punishments,” an homage to Beccaria's treatise. BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 303-6 (reprinting a portion of St. John Honeywood's poem titled “Crimes and Punishments”); *see also* THE EVENING POST (New York, NY), Aug. 26, 1830, p. 2 (“The American poet Honeywood, more than thirty years ago, in putting the maxims of Beccaria into verse, said—(we quote from memory)—‘Close to the gibbet's side the villain clings, / And pilfers while the hapless culprit swings’”).

²⁹ *See, e.g.*, “Does Capital Punishment Prevent Crime,” THE ROBESONIAN (Lumberton, NC), Oct. 15, 1906, p. 7 (“Those laws, too, are passing away before the enduring eloquence of men like Beccaria, Montesquieu, Turgot, Franklin, Guizot, Augo, and John Bright and the inexorable logic of an experience that is teaching the world the folly of shedding human blood.”); Benjamin F. New Hall, “Minority Report on Capital Punishment,” THE LIBERATOR (Boston, MA), May 3, 1844, p. 4:

Even the criminal is beginning to be recognized as a man, and to be treated in accordance with his spiritual dignity. The mitigation in our own criminal code, as well as that in many States in the Union, points firmly and directly at the entire abolition of the gallows. To be sure, there may be some who may coldly sneer at this, as a matter of little consequence, if indeed worthy of engaging the attention of legislators at all; but to such it may be necessary only to say, that if this is a weak humanity, it is the weakness of Dr. Johnson, of Judge Blackstone, of Beccaria, and Montesquieu.

leading books on the American Revolution and constitutional law.³⁰ Other important figures of the Italian Enlightenment—Pietro and Alessandro Verri, Gaetano Filangieri and Giacinto Dragonetti, to name but four—are still more obscure, though they once inspired—or were inspired by—Beccaria’s game-changing treatise. And this is to say nothing of other Italian writers, such as Ferdinando Galiani, who wrote on the topic of trade, that at least some of America’s founders were familiar.³¹

Pietro and Alessandro Verri, Milanese brothers, formed a social academy, the Society of Fists, to improve the local Milanese government and economy, and

³⁰ See, e.g. PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788* (New York: Simon & Schuster, 2010) (containing no index entry for Beccaria); PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (New York: First Vintage Books, 1998) (same); JACK N. RAVOKE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (New York: First Vintage Books, 1997) (same); RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* (New York: Random House, 2010) (same); CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787* (New York: Little, Brown & Co., 1986) (same).

Only a few historians have paid proper attention to Beccaria’s influence in the American colonies. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (Cambridge: Harvard University Press, enlarged ed. 2012):

The ideas and writings of the leading secular thinkers of the European Enlightenment—reformers and social critics like Voltaire, Rousseau, and Beccaria as well as conservative analysts like Montesquieu—were quoted everyone in the colonies, by everyone who claimed a broad awareness. In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and government contract, Montesquieu and later Delolme on the character of British liberty and on the institutional requirements for its attainment, Voltaire on the evils of clerical oppression, Beccaria on the reform of criminal law, Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.

See also *id.* (“Josiah Quincy, Jr., referred with approval to a whole library of enlightened authors, among them Beccaria, Rousseau, Montesquieu, and the historian Roberson . . .”).

³¹ STUART WOOLF, *A HISTORY OF ITALY, 1700-1860: THE SOCIAL CONSTRAINTS OF POLITICAL CHANGE* 99 (London: Methuen & Co., 1999); James Madison to John Henry Purviance, Dec. 24, 1804; John Adams Papers, Mar. 9, 1783, *available at* [www.founders.archives.gov](http://wwwFOUNDERS.archives.gov).

Beccaria's association with that group led to Beccaria's writing of *Dei delitti e delle pene*. It was the Verri brothers who encouraged, facilitated and later defended Beccaria's writing of *On Crimes and Punishments*, one of the major contributions of the Italian Enlightenment and its jocularly named Society of Fists, known for its pugilistic debates on issues of economics and public policy.³² In that era, literary societies and social clubs were being formed throughout Europe to facilitate human progress and the advancement of knowledge. English, French and Italian coffeehouses—along with ink, printing presses and the transatlantic book trade—facilitated all manner of intellectual exchanges in this multi-continent Republic of Letters.³³

Public art is often a reflection of societal values, with statues of public figures regularly commissioned to honor those of historical importance. In the

³² BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 30.

³³ In a 1769 letter to Charles Thomson and Thomas Mifflin, Benjamin Franklin—speaking about the Library Company of Philadelphia—wrote: “I think we should have, in some one of our public Libraries, all the Transactions of the every Philosophical Society in Europe, vizt. The Memoirs of the Academy of Sciences at Paris; those of Petersburg; of Haerlem in Holland; of Bononia in Italy &c. with the Continuations as they come out Yearly; and also the French Encyclopedia.” Benjamin Franklin to Charles Thomson and Thomas Mifflin, July 7, 1769. A “List of Learned Societies” from late 1801—and endorsed by Thomas Jefferson in early 1802—notes “[t]ransactions ordered for” the following societies: Royal Academy of Sciences Turin; Society of Milan; Society of Bologna; Society of Florence; Academy of Mexico; Academy of Lyons; Academy of Rouen; Royal Academy of Belles Lettres at Seville; Society for Promoting Arts & Manufac[.] & Commerce in London. In the 1780s, the new Società Patriotica of Milan began to exchange publications with the American Philosophical Society. Benjamin Franklin and Dr. Benjamin Rush were made corresponding members of that Milan association. In the 1770s, Philip Mazzei took charge of correspondence with the academies of Bologna and Turin. Enclosure: List of Learned Societies, Dec. 29, 1801, available at www.founders.archives.gov. Jefferson himself associated and corresponded with Italians such as Philip Mazzei, Carlo Bellini and Adamo Fabbroni, often receiving letters in Italian. *E.g.*, Thomas Jefferson to Adamo Fabbroni, Antoine Gouan, Lacépède, Marc Auguste Pictet, and André Thouin, Mar. 6, 1815 (noting that “Doct^r Barton, my friend,” “one of the Vice presidents of the American Philosophical society,” would be traveling to Florence “in the course of his travels”); Carlo Bellini to Thomas Jefferson, Mar. 16, 1801.

courtyard of Milan's Pinacoteca di Brera, just down the street from where Cesare Beccaria once lived at Via Brera 6,³⁴ stands an imposing sculpture of Pietro Verri (1728-1797). A now little-known Italian writer, it was Verri who formed the *Accademia dei pugni*, or Society of Fists, the Milanese social club which Beccaria joined and associated himself. As part of its work, the Society of Fists produced an influential journal, *Il Caffé*, Italian for "the coffee-shop" or "the coffee."³⁵ The avowed purpose of the journal, per Pietro Verri's private correspondence in 1765: "We will always make all efforts to our coffee-shop to attack the nation's barbarism with the most powerful weapons at our disposal."³⁶ The interest in the topic of avoiding cruelty and barbarity was one of considerable local interest, especially in light of the Inquisition and its long history.³⁷ In Milan, a Column of Infamy—erected in 1631 to commemorate the wrongful execution of two men falsely accused of spreading a poison that, in 1630, was once erroneously thought to have caused a deadly plague—stood in that locale until the year 1778.

³⁴ <http://www.munumu.com/cities/milan/profumo.html>; Maria Luisa Menozzi Cantele, "I 'vip' di ieri nelle case di oggi," *Notiziario*, No. 32, p. 7 (Feb. 2011), *available at* <http://www.algiusmi.it/wp-content/uploads/2012/02/Notiziario-Algiusmi-Numero-32.pdf>.

³⁵ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 30; Sophus A. Reinert, "Patriotism, Cosmopolitanism and Political Economy in the *Accademia dei pugni* in Austrian Lombardy, 1760-1780," in KOEN STAPELBROEK & JANI MARJANEN, EDS., *THE RISE OF ECONOMIC SOCIETIES IN THE EIGHTEENTH CENTURY* 131 (New York: Palgrave Macmillan, 2012).

³⁶ Reinert, *supra* note 35, at 135. Of the journal's role, Pietro Verri would also write:

I think it is good that many write and think about the true interests of a nation, about finances, about commerce, and about agriculture; mist and mystery serve the immunity of a few and the misery of many. It is good that the facts of political economy are known, because it is good that many think about them, and truth is always rendered clearer and simple by the ferment of different opinions. Whoever sends us reasonable writings on these matters will always have a place of honour in the pages of this journal.

³⁷ *Id.* at 136.

Beccaria's own grandson, Count Alessandro Manzoni (1785-1873),³⁸ would later write a famous historical novel, *I Promessi Sposi* (*The Betrothed*), and a sequel, *La Storia della Colonna infame* (*The Story of the Column of Infamy*), about that miscarriage of justice.³⁹

³⁸ Alessandro Manzoni—the son of Cesare Beccaria's daughter Giulia—was, by most accounts, fathered by Giulia's lover Giovanni Verri, a brother of Pietro and Alessandro Verri. See CLAUDIO POVOLO, *THE NOVELIST AND THE ARCHIVIST: FICTION AND HISTORY IN ALESSANDRO MANZONI'S THE BETROTHED* 17 n.4 (New York: Palgrave Macmillan, 2014) ("While Giulia's husband Pietro Manzoni—whom her father had forced her into marrying—recognized Alessandro as his son, Alessandro's biological father was Giovanni Verri, a musician and brother to Pietro and Alessandro Verri, both *philosophes* in Beccaria's circle. Giovanni Verri and Giulia Beccaria were lovers in the mid-1780s.").

³⁹ As one source puts it:

The actual Column of Infamy had been erected in Milan in 1631 to commemorate the execution of two men who had been falsely accused of spreading a poison that caused the horrifying plague Manzoni so vividly described in *I promessi sposi*. This miscarriage of justice haunted future generations of Milanese. At the end of the 18th century, several Enlightenment thinkers—above all Pietro Verri and Cesare Beccaria—began to see the infamy attached not to the men who were executed, for it had become increasingly clear that they were innocent, but to the legal system that had led to this great miscarriage of justice. Verri dealt explicitly with the matter in his *Osservazioni sulla tortura*, written in 1766 but not published until 1804, while Beccaria's engagement with this trial was more abstract but nonetheless evident in his *Dei delitti e delle pene* (*On Crimes and Punishments*) published in 1764.

POVOLO, *THE NOVELIST AND THE ARCHIVIST*, *supra* note 37, at 11; compare EDWARD PETERS, *TORTURE* 86 (Philadelphia: University of Pennsylvania Press, 1985) ("In 1842 Alessandro Manzoni published his epigonal indictment of the criminal procedure of the *ancien régime*, *The Story of the Column of Infamy*, an account of a famous trial in Milan in 1630, whose title referred to a column erected at the site of a demolished house of a criminal to remind the Milanese forever of the shame of the criminal."); see also Alessandro Manzoni (1785-1873), *I Promessi Sposi*, The Harvard Classics, 1909-14, Introductory Note, available at <http://www.bartleby.com/21/1001.html> (describing the history of Manzoni's historical novel); POVOLO, *supra* note 37, at 68 ("Agostino Carli Rubbi was most likely the archivist from whom Manzoni came into possession of the 17th [century] trial records that inspired his novel. Carli Rubbi knew the Milanese cultural environment very well: in the 1760s [he] had been the favourite student of Cesare Beccaria, illustrious expert on criminal law and Manzoni's grandfather. Carli Rubbi first worked in the archive at San Teodoro and then in the Frari archive, where the documents of the former Venetian Republic had been transferred."); id. at 69-70 (noting that Agositino Carli Rubbi was born in Venice in 1748, studied law in Vienna, lived in Milan and was introduced to "men of letters" such as Giuseppe Gorani, Paolo Frisi and Pietro Verri; and further nothing that Rubbi was Cesare Beccaria's student and friend

The elder Pietro Verri and his protégé Cesare Beccaria thus shared a disdain for barbaric practices. Verri's statue, in fact, is just a short stroll and a flight of stairs away from the Pinacoteca di Brera museum's large sculpture of Beccaria, the man Verri mentored in life. A veteran of the Seven Years' War, the older Pietro Verri wrote, in Italian, an influential meditation on the concept of happiness that inspired Beccaria's own writings, and which, in turn, inspired the views of colonial and early Americans.⁴⁰ Pietro's younger brother Alessandro, closer in age to Beccaria, served as Milan's protector of prisons, in which role he was exposed to prisoners and a panoply of criminal-law issues.⁴¹ Alessandro, whose knowledge of prisons enabled Beccaria to better understand crimes and punishments, traveled with Beccaria to Paris in 1766 after *On Crimes and Punishments* was lauded by the French *philosophes*.⁴² While few Americans today, quite understandably, would recognize the names of either Pietro or Alessandro Verri, Pietro and Alessandro clearly molded Beccaria's ideas and

who, according to one of Rubbi's own July 1770 letters, "[f]or the last fortnight" spent "each afternoon from one o'clock till after seven in enthusiasm and delight quite alone with my dear friend Beccaria, with never a dull moment, and completely unawares of the passage of time").

⁴⁰ Reinert, *supra* note 35, at 137-38. Pietro Verri, like Cesare Beccaria, was an economist. It is evident that Pietro Verri's *Meditations on Happiness*—or *Discourse on Happiness*, as it is sometimes translated—informed Beccaria's own treatise on the criminal law. BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 31, 35; LUIGINO BRUNI & PIER LUIGI PORTA, EDS., *HANDBOOK ON THE ECONOMICS OF HAPPINESS* 28, 75, 99 (Northampton, MA: Edward Elgar Publishing, 2007) ("Pietro Verri outlines a theory of public happiness quite close to that of Beccaria: 'The excess of wants over the ability to satisfy them is the measure of man's unhappiness; and no less so, of the wretchedness of a state'. Once human beings have overcome a primitive state in which they 'are seldom unhappy, because their needs are few' a twofold path is open to mankind: 'need sometimes leads men to plunder, sometimes to trade'" (citations omitted).

⁴¹ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 30, 33.

⁴² *Id.* at 60; 1 GAETANA MARRONE, ED., *ENCYCLOPEDIA OF ITALIAN LITERARY STUDIES* 147 (New York: Routledge, 2007).

Alessandro's works of literature were once translated and sold in America in the 1820s.⁴³

Truth be told, the influence of the Italian Enlightenment on American law and thought thus extends far beyond Cesare Beccaria's own contributions to it. Of considerable note, Gaetano Filangieri, of Naples, wrote *The Science of Legislation*, a multi-volume treatise avidly read by Benjamin Franklin and later sold by American booksellers.⁴⁴ After reading the first two volumes of Filangieri's treatise, Benjamin Franklin—anticipating a forthcoming volume of Filangieri's treatise—himself wrote to Filangieri: "I was glad to learn that you were proceeding to consider the criminal laws." "None have more need of reformation," Franklin wrote Filangieri from Passy on January 11, 1783, four years before Benjamin Franklin was a delegate to the Constitutional Convention in Philadelphia. Of criminal laws, Franklin made this point to his much younger Italian correspondent: "They are everywhere in so great disorder, and so much injustice is committed in the execution of them, that I have been sometimes

⁴³ "Roman Nights," THE EVENING POST (New York, NY), Jan. 19, 1826, p. 3 (advertising Alessandro Verri's book, *Roman Nights; or the Tomb of the Scipios*, translated from the Italian "by a lady," with the book for sale at "G. & C. Carvill, 108 Broadway"); "New Books," RALEIGH REGISTER AND NORTH-CAROLINA GAZETTE (Raleigh, NC), June 13, 1826, p. 1 (advertising Alessandro Verri's book, *Roman Nights; or the Tomb of the Scipios*, translated from the Italian "by a lady," with the book for sale by J. Gales & Son).

⁴⁴ "New Books," THE EVENING POST (New York, NY), Aug. 24, 1805, p. 1 (offering for sale Filangieri's *Science of Legislation*). The writings of Gaetano Filangieri was once lumped with "the works of . . . Montesquieu, Condillac, Hume, Locke, &c. and all other writings, in short, of any value." PITTSBURGH GAZETTE AND MANUFACTURING AND MERCANTILE ADVERTISER (Pittsburgh, PA), July 10, 1820, p. 2; cf. THE EVENING POST (New York, NY), June 20, 1820, p. 2 (listing "the works of Puffendorf, Montesquieu, Filangieri, Beccaria, Condillac, Hume, Locke, Pope" together). For a lively discussion of Beccaria's and Filangieri's influence on American law, see "Filangieri & Franklin: The Italian Enlightenment and the U.S. Constitution," Library of Congress, Oct. 21, 2010, <https://www.youtube.com/watch?v=dAkmE9wWwmc>.

inclined to imagine less would exist in the world if there were no such laws, and the punishment of injuries were left to private resentment.”⁴⁵

Despite the neglect of many U.S. historians, the Italian Enlightenment—or *Illuminismo*, as the Italians call it⁴⁶—played a crucial role in the development of American law, with Beccaria’s treatise, *On Crimes and Punishments*, leading the way.⁴⁷ In fact, the Continental Congress—as an entire body, then meeting in

⁴⁵ 9 ALBERT HENRY SMYTH, ED., *THE WRITINGS OF BENJAMIN FRANKLIN* 1-2 (New York: The Macmillan Co., 1906).

⁴⁶ The *Illuminismo*, or *light*, has been described as distinct from the French Enlightenment and the English Enlightenment “in its determination not to lose sight of the psychic faculties and the social conditions out of which reason emerges.” As that source summarizes the major aspects of the Italian Enlightenment.

The figures of the Italian Enlightenment—in its two main centers, Naples and Milan—retain a close contact with civil society and practical life. The explicit refusal of metaphysics and of abstraction is exemplified by Antonio Genovesi (1712-69), the first person in Europe to be appointed to a chair in political economy (in 1754), and whose thought focused on the interwoven interests and aspirations of humankind, and on the struggle against privilege. The Enlightenment philosophy of Lombardy was more orientated toward law; it also found expression in the dynamic review *Il caffè* (1764-66), and its major representatives were Pietro Verri (1728-97) and Cesare Beccaria (1738-94). The Enlightenment project for them, on the one hand, developed in the direction of a modernization of society, facilitating the individual search for happiness, and, on the other, aimed at making the correctional system more humane through the abolition of torture, by humanizing punishment, and by making judgments more clear-cut and quicker. The light of a human reason (and no longer that of Providence) that tried hard to become more just, thus struggled to break through the darkness of social life.

BARBARA CASSIN, EMILY APTER, JACQUES LEZRA & MICHAEL WOOD, EDS., *DICTIONARY OF UNTRANSLATABLES: A PHILOSOPHICAL LEXICON* 521 (Princeton, NJ: Princeton University Press, 2014).

⁴⁷ Anthony V. Baker, “*Through a Glass, Darkly . . .*”: *Christianity, Law and Capital Execution in Twenty-first Century America*,” 82 U. DET. MERCY L. REV. 521, 521 n.2 (2005) (noting that Cesare Beccaria’s *On Crimes and Punishments* “influenced American thinking” on capital punishment and “elicited great interest and broad support among Enlightenment thinkers throughout Europe” and was “widely read in the United States as well”) (quoting *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 4 (Hugo Adam Bedau, ed., 1997)).

Philadelphia⁴⁸—cited the work of Beccaria and Montesquieu side by side before the United States of America was formed through the Declaration of Independence.⁴⁹ Early American sources—among them, books, magazines, newspapers and early state and congressional debates—thus frequently sing the praises of *both* Montesquieu and Beccaria.⁵⁰ Yet, the contributions of Beccaria and his disciples to American law have long been underreported—more often than not, not mentioned at all—by twenty-first century scholars.⁵¹ Everyday Americans know the name of Voltaire, the French writer who penned famed works such as *Candide*. But because Beccaria has gotten such short shrift in the history books, few Americans likely know that Voltaire—known for his signature wit—once wrote a lengthy and influential commentary on Beccaria’s treatise before the Revolutionary War.⁵²

Beccaria’s contributions—urging rationality to moderate severe punishments and suggesting laws be clear and precise to eliminate the need for arbitrary judicial discretion—should no longer be ignored. As Americans—and

⁴⁸ The First Continental Congress met from September 5, 1774 to October 26, 1774 at Carpenter’s Hall. It included delegates from twelve colonies—no representatives from Georgia were there—and it met in response to the Coercive Acts, also known as the Intolerable Acts, put in place by the British Parliament after the Boston Tea Party. Peyton Randolph presided over the Congress, but Henry Middleton took over that responsibility for the last few days of the proceedings. 1 THE AMERICAN ALMANAC AND REPOSITORY OF USEFUL KNOWLEDGE FOR THE YEAR 1830, at 183 (Boston: Charles Bowen, 2d ed. 1833).

⁴⁹ Declaration of Independence (July 4, 1776).

⁵⁰ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 3-4, 75-149, 564-68; *see also* “Public Execution,” COLUMBIAN REPOSITORY (Chapel Hill, NC), June 18, 1836, p. 3 (“take the sage and impressive remarks of Montesquieu [sic] and Beccaria”).

⁵¹ As noted earlier, Beccaria’s name is not even mentioned in some prominent histories of the Declaration of Independence and the Constitution. *See supra* note 30.

⁵² AN ESSAY ON CRIMES AND PUNISHMENTS, TRANSLATED FROM THE ITALIAN; WITH A COMMENTARY ATTRIBUTED TO MONS. DE VOLTAIRE, TRANSLATED FROM THE FRENCH (London: J. Almon, 1767).

American lawyers and jurists, including the U.S. Supreme Court Justices—continue debating the U.S. Constitution’s meaning, Beccaria’s influence on the Founding Fathers’ views on law, justice and cruelty should be recalled, particularly in the context of the Eighth Amendment’s ban on “cruel and unusual punishments.”⁵³ Beccaria’s name already appears in four U.S. Supreme Court opinions,⁵⁴ but through the passage of time, the American people—living in an age of mass incarceration and lethal injection—have lost sight of a major focus of the American Revolution: the elimination of sanguinary and unnecessary

⁵³ See John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BR. J. AM. LEG. STUDIES 297, 428-51 (2013). Prominent jurists once widely celebrated the influence of Enlightenment writers on the Declaration of Independence and the U.S. Constitution and its Bill of Rights. See, e.g., “Germs of Constitution Found in Ages of the Past: Justice Woodward on the Debt We Owe to Those Who Sowed the Seeds of Liberty,” THE BROOKLYN DAILY EAGLE (Brooklyn NY), Apr. 24, 1903, p. 13 (Justice John Woodward of the Appellate Division of the Supreme Court, in an address to the Brooklyn Law School titled “Sources of the Constitution,” references Montesquieu, Blackstone, Vattel, Delolme and Beccaria, among many other Enlightenment writers, as having influenced the U.S. Constitution); “Independence Grew,” THE INDIANAPOLIS NEWS, July 3, 1925, p. 6 (“The Declaration of Independence was far from being a sudden outburst of patriotic emotion or a sudden demand for the recognition of the right to life, liberty and the pursuit of happiness. . . . According to Edmund Burke, American lawyers had much to do in creating a desire for political independence. Laws and theories of government were much discussed by them. In turn, these theories of government and of law were discussed by the people themselves. . . . They read and discussed books. They gathered their philosophy from the writings of Grotius, Puffendorf, Locke, Burlamaqui, Beccaria, Montesquieu and others.”).

⁵⁴ *Ullmann v. United States*, 350 U.S. 422 (1956) (Douglas, J., dissenting) (“Beccaria, whose works were well known here and who was particularly well known to Jefferson, was the main voice against the use of infamy as punishment.”); *Solem v. Helm*, 463 U.S. 277, 312 n.5 (1983) (Burger, C.J., dissenting) (Beccaria’s name appears in the following comment cited by the Court: *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975)); *Payne v. Tennessee*, 501 U.S. 808, 820 (1991) (“Writing in the 18th century, the Italian criminologist Cesare Beccaria advocated the idea that ‘the punishment should fit the crime.’ He said that ‘[w]e have seen that the true measure of crimes is the injury done to society.’”) (citing J. FARRER, CRIMES AND PUNISHMENTS 199 (1880)); *Furman v. Georgia*, 408 U.S. 238, 343 n.85 (1972) (Marshall, J., concurring) (“Punishment as retribution has been condemned by scholars for centuries . . .”) (citing CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (H. Paolucci, trans., 1963)).

punishments. Only by studying Beccaria's writings and the founding generation's reaction to them can one fully appreciate the full extent of Beccaria's enormous contributions to the origins of American law—and, perhaps, gain insights into where Americans should go from here in terms of future penal reform.⁵⁵

This Article sets the historical record straight by identifying the significant contributions of the Italian Enlightenment to American law, with a particular focus on the influence of Cesare Beccaria and his mentors and disciples. Most telling: even before fighting broke out between British soldiers and American militiamen at Lexington and Concord, Massachusetts, in April 1775, John Dickinson—of Pennsylvania—was referring to Beccaria's "genius" and "masterly hand."⁵⁶ Dickinson is often described as the "Penman of the Revolution," though he opposed it while forcefully and simultaneously insisting on colonists' rights.⁵⁷ In fact, an array of newspapers and other sources prior to the U.S. Constitution's ratification make reference to Beccaria and other Italian thinkers.⁵⁸ In the October 18, 1787 edition of the *New York Journal*, "Brutus," in making a point, says "I shall content myself with quoting" only two "illustrious authorities": Montesquieu and Beccaria. And in a June 21, 1788 speech at New York's

⁵⁵ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 5-11.

⁵⁶ *Id.* at 69; "From the Publick Ledger," *THE VIRGINIA GAZETTE* (Williamsburg, VA), Feb. 24, 1775, p. 2. The *Virginia Gazette*, then printed by Alexander Purdie, had as its slogan, "Always for LIBERTY, and the PUBLICK GOOD." *Id.*, p. 1.

⁵⁷ JANE E. CALVERT, *QUAKER CONSTITUTIONALISM AND THE POLITICAL THOUGHT OF JOHN DICKINSON* 13-16 (Cambridge: Cambridge University Press, 2009).

⁵⁸ "A Speech, intended to have been delivered in the House of Commons, in Support of the American Congress' Petition to the King," *THE PENNSYLVANIA GAZETTE* (Philadelphia, PA), Aug. 30, 1775, pp. 1-2 ("Under so shameful a violation of Parliamentary Faith, what confidence, what respect can you desire from America? What other bond of Government will be left you, but fear? And let me ask in the words of the sagacious Beccaria, 'What ought we to think of that Government which has no other means of managing the subject, but fear?'").

ratifying convention, Melancton Smith quoted Beccaria from Congress's 1774 address to the inhabitants of Quebec.⁵⁹ Numerous colonial and early Americans, of course, owned Beccaria's treatise, with one scholar writing: "In America, Beccaria's radical book soon became highly influential among the Founders, especially Adams and Jefferson."⁶⁰ Beccaria's treatise shaped American law in multiple respects, with its pro-republican, anti-cruelty, and anti-tyrannical messages shaping the American Revolution itself.

This Article begins by summarizing the reception *On Crimes and Punishments* received in colonial and early America. It then shows how that book shaped the Founding Fathers' views, including on punishment practices and the development of prisons, before offering some concluding thoughts on modern American jurisprudence. While Part I of the Article details how Beccaria's treatise shaped America's founders, Part II contextualizes Beccaria's pervasive and catalyzing influence on the American Revolution. Part III then discusses how Beccaria's writings—as well as those of other Italian thinkers who followed him—not only influenced the founders' views on cruelty, but effectively spurred the creation of America's penitentiary system.⁶¹ Neither the American

⁵⁹ STEPHEN L. SCHECHTER, ED., *ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED* 401-7, 416-18 (Madison, WI: Madison House, 1990).

⁶⁰ THOMAS KATHEDER, *THE BAYLORS OF NEWMARKET: THE DECLINE AND FALL OF A VIRGINIA PLANTER FAMILY* 118 (Bloomington, IN: iUniverse, 2009).

⁶¹ "Revised Criminal Code," *RALEIGH REGISTER AND NORTH-CAROLINA STATE GAZETTE* (Raleigh, NC), Aug. 16, 1811, p. 1 (reprinted extracts from "an account of the State Prison or Penitentiary House in the city of New-York, published some years ago by one of the Inspectors," include the following: "But while the names of Montesquieu, Beccaria and Howard, are repeated with gratitude and admiration, the legislators and philanthropists of our own country deserve not to be forgotten." "Though restrained for a time, the spirit of reform revived with the revolution; and, strengthened by discussions of the general principles of freedom, and the writings of Beccaria and others, at length produced that system of punishment for crimes, which reflects so much honor on that

Revolution nor the U.S. Constitution and its Bill of Rights, the Article concludes, can be fully understood without considering the profound influence of the Italian Enlightenment, and Beccaria in particular, on American law. In offering final thoughts about the death penalty, one of the focuses of *On Crimes and Punishments*, this Article—channeling Beccaria’s approach—seeks to provide what Jeremy Bentham labeled a “censorial” approach to jurisprudence.⁶²

II. CESARE BECCARIA’S TREATISE IN AMERICA

a. On Crimes and Punishments

Cesare Beccaria’s Italian treatise, *Dei delitti e delle pene* (1764), argued against torture, the death penalty, and—following Montesquieu’s advice—all unnecessary punishments more broadly, calling them “tyrannical.”⁶³ The book was translated into French shortly after its initial publication by André Morellet, the same translator who later did a French translation of Thomas Jefferson’s *Notes on the State of Virginia*.⁶⁴ *Dei delitti e delle pene* was also translated into English in 1767 as *An Essay on Crimes and Punishments*, and it wasn’t long before Beccaria’s ideas were the talk of greater London and at English institutions of higher learning.⁶⁵ *On Crimes and Punishments* would be a major influence, in

State. The new penal laws of Pennsylvania, its prisons and penitentiary house, the progress, internal economy, and management, have been already made known by several publications.”).

⁶² BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 4.

⁶³ *Id.* at 16, 172, 343.

⁶⁴ *Id.* at 27.

⁶⁵ “This Day Is Published,” THE PUBLIC ADVERTISER (London, England), May 1, 1767, p. 1 (noting that *The Critical Review* for April 1767 contains “Beccaria’s Essay on Crimes and Punishments”); “This Day Is Published,” THE PUBLIC ADVERTISER (London, England), June 2, 1770, p. 3 (noting the publication of various pamphlets, including “A Discourse upon Oeconomy and Commerce, from the Italian of the celebrated Marquis Cæsar Beccaria, Author of the Treatise on Crimes and Punishments”); “This Day Is

fact, on a host of European reformers, including John Howard, Sir William Blackstone and Jeremy Bentham. Appointed the High Sheriff of Bedfordshire in 1773, the English penal reformer John Howard (1726-1790) went on to inspect prisons—and prison conditions—throughout Europe.⁶⁶

Beccaria's treatise sought a major overhaul of the law. "If we look into history," Beccaria wrote in the introduction to *On Crimes and Punishments*, "we shall find that laws which are or ought to be conventions between men in a state of freedom have been for the most part the work of the passions of a few or the consequences of fortuitous or temporary necessity; not dictated by a cool examiner of human nature, who knew how to collect in one point the actions of a multitude and had this only end in view, *the greatest happiness of the greatest number*." "Good legislation," Beccaria wrote in a later passage, "is the art of conducting men to the maximum of happiness and to the minimum of misery, if we may apply this mathematical expression to the good and evil of life." This formulation, along with Joseph Priestley's and Francis Hutcheson's similar philosophical expressions, spurred Bentham's life-long utilitarianism, and

Published," THE PUBLIC ADVERTISER (London, England), June 2, 1772, p. 4 (noting the publication of "A Discourse on Oeconomy and Commerce, by the celebrated Marquis Cæsar Beccaria, Author of the Treatise on Crimes and Punishments"); "This Day Is Published," THE PUBLIC ADVERTISER (London, England), June 13, 1777, p. 1 (noting the publication of "[t]he Fourth Edition of, An Essay on Crimes and Punishments: Translated from the Italian of the Marquis Beccaria; with a Commentary, attributed to Voltaire, translated from the French"); "To the Printer of the Public Advertiser," THE PUBLIC ADVERTISER (London, England), Aug. 31, 1778, p. 1 (quoting Beccaria's *Dei delitti e delle pene* in the original Italian).

⁶⁶ Colonial and early American lawyers avidly read William Blackstone's *Commentaries on the Laws of England*. In those *Commentaries*, Blackstone called Beccaria "an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the certainty, than by the severity, of punishment." JOHN D. BESSLER, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT* 51-53 (Boston: Northeastern University Press, 2012).

inspired the penal reform efforts of a whole generation of social reformers. Howard went on to urge much-needed reforms within prisons themselves, Bentham would draft penal codes for a variety of nations, and Blackstone pushed for the adoption of a penitentiary system in England.⁶⁷

b. Beccaria in America

Though less well known, Beccaria's *On Crimes and Punishments* also deeply impressed signers of America's Declaration of Independence. Signers from John Adams and John Hancock in Massachusetts, to Thomas Jefferson in Virginia, and from Dr. Benjamin Rush and James Wilson of Pennsylvania to other important revolutionaries, read—and were deeply moved by—Beccaria's book. Beccaria's treatise opposed laws, including cruel and tyrannical ones, that decreased people's happiness, and Beccaria's ideas proved to be contagious both in Europe and America.⁶⁸ Although Beccaria's book, along with other thinkers and titles of that era, moved individual founders to action in different ways, Beccaria's fingerprints are all over penal reform efforts in America's founding era.

⁶⁷ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 41, 95-100; F. C. MONTAGUE, ED., JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 27 (Union, NJ: The Lawbook Exchange, 2001); *see also* THE COURIER-JOURNAL (Louisville, KY), Aug. 24, 1884, p. 14 (“*Greatest Happiness of the Greatest Number*.—This expression is used by Beccaria in the introduction to his ‘Essay on Crimes and Punishment’ (1764).”); *id.* (““That action is best which procures the greatest happiness for the greatest numbers.”—[Hutcheson's *Inquiry Concerning Moral Good and Evil*. (1720)]”; *id.* (““Priestly was the first (unless it was Beccaria) who taught my lips to pronounce this sacred truth—that the greatest happiness of the greatest number is the foundation of morals and legislation.”—*Bentham's Works*.”); WILLIAM ROBERT SCOTT, FRANCIS HUTCHESON: HIS LIFE, TEACHING AND POSITION IN THE HISTORY OF PHILOSOPHY 273 (Cambridge: Cambridge University Press, 1900) (discussing Beccaria's and Bentham's influences, tracing back, in part, to Hutcheson).

⁶⁸ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 48-49; BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 147.

Just a sampling of the Founding Fathers' reform-minded efforts makes the point. Dr. Rush—the Philadelphia physician who facilitated the reconciliation of ex-Presidents Thomas Jefferson and John Adams after their painful parting of ways in the wake of the contentious U.S. presidential election of 1800—became a fervent Beccaria disciple and one of the first Americans to call for the total abolition of capital punishment.⁶⁹ John Hancock, in 1793, called for outlawing the non-lethal corporal punishments of “cropping and branding, as well as that of the Public Whipping Post.”⁷⁰ And James Wilson—second only to James Madison in terms of spearheading efforts at the 1787 Constitutional Convention in Philadelphia—repeatedly brought up Beccaria's ideas in his writings and law lectures.⁷¹ In America's founding era, Beccaria was regularly hailed as “benevolent,” “celebrated,” “learned,” “immortal,” of “great genius,” and as a “sublime philosopher,”⁷² the kind of monikers reserved for the most revered Enlightenment writers such as Montesquieu, Beccaria's much-esteemed French predecessor and intellectual muse.⁷³

Indeed, through the transatlantic shipment of books, Beccaria's writings were soon easily available—and much lauded—in colonial and early America, with the overseas book trade bringing many new titles to American soil.⁷⁴ In the

⁶⁹ KENT S. MILLER & MICHAEL L. RADELET, *EXECUTING THE MENTALLY ILL: THE CRIMINAL JUSTICE SYSTEM AND THE CASE OF ALVIN FORD* 111 n.5 (Newbury Park, CA: Sage Publications, 1993); JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* xi-xii (Oxford: Oxford University Press, 2004).

⁷⁰ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 373.

⁷¹ BESSLER, *CRUEL AND UNUSUAL*, *supra* note 66, at 51.

⁷² BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 3, 5, 34-35, 50, 65, 79-80, 147, 164, 166-67, 172, 192, 206, 270, 312, 331, 366, 369-70, 385, 396.

⁷³ *Id.* at 9, 29, 48, 147, 180, 220, 333, 343, 366.

⁷⁴ *See generally id.* at 75-81, 124-32.

July 1, 1773 edition of *The Virginia Gazette*—whose slogan was “Open to ALL PARTIES, but influenced by NONE”—the newspaper ran a story on the King of Poland, listing Beccaria among the great writers of the age. As the paper wrote of the Polish king’s reading habits in its profile: “From his intimacy with the great writers of antiquity, as Xenophon, Thucydides, Livy, Tacitus, Plutarch, and some of the most illustrious of these latter ages, as Sydney, Montesquieu, and Beccaria, he has strengthened the notions (before dictated by the happy temperature of his nature) on the rights of mankind in gross, of the obligations which the governing part, or Magistrates (whatever titles they bear) are under to make the welfare and prosperity of the great aggregate their principal, their only object”⁷⁵ The wide range of American libraries and booksellers that stocked Beccaria’s book—the one listed right alongside Montesquieu’s treatise—made it the eighteenth-century equivalent of a *New York Times* bestseller.⁷⁶

The Constitutional Convention took place in Philadelphia in 1787, but Beccaria’s book was being sold and admired in that city long before that time. For instance, *The Pennsylvania Packet*, published in Philadelphia, ran this notice in mid-September 1778: “A few COPIES of the following much esteemed modern Work, may be had at BELL’S BOOKSTORE, next door to St. Paul’s Church, in Third-street, Philadelphia, AN ESSAY ON CRIMES AND PUNISHMENTS: Written by the MARQUIS BECCARIA, of MILAN. With a COMMENTARY, attributed to Monsieur DE VOLTAIRE.” Robert Bell—the printer—published an octavo edition

⁷⁵ “Description and Character of the King of Poland,” *THE VIRGINIA GAZETTE* (Williamsburg, VA), July 1, 1773, p. 2.

⁷⁶ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 13, 17, 93-94, 124-25, 136-39, 141, 144, 204, 234, 261, 315, 362-63.

of Beccaria's treatise in 1778.⁷⁷ The news item in the *Pennsylvania Packet*, advertising Beccaria's essay, was accompanied by an extract from the translator's preface that read as follows:

*PENAL Laws, so considerable a part of every system of legislation, and of so great importance to the happiness, peace and security of every member of society, are still so imperfect, and are attended with so many unnecessary circumstances of cruelty in all nations, that an attempt to reduce them to the standard of reason must be interesting to all mankind. It is not surprising, then, that this little book hath engaged the attention of all ranks of people in every part of Europe. It is now about eighteen months since the first publication; in which time it hath passed no less than six editions in the original language; the third of which was printed within six months after its first appearance. It hath been translated into French; that translation hath also been several times reprinted, and perhaps no book on any subject was ever received with more avidity, more generally read, or more universally applauded.*⁷⁸

Copies of Beccaria's treatise, on bookstore shelves very close to where the Founding Fathers gathered to draft the U.S. Constitution, continued to be sold in Philadelphia, and were, in fact, very popular in the lead up to the Constitutional Convention itself. Prominent Philadelphia booksellers—among them, William Prichard, the Quaker Joseph Crukshank, and Irish immigrants Henry and Patrick Rice, brothers of the Dublin bookseller John Rice—regularly offered copies of Beccaria's book for sale along with many other progressive, forward-leaning titles.⁷⁹ American booksellers sold Beccaria's book in Philadelphia and elsewhere

⁷⁷ Id. at 90.

⁷⁸ THE PENNSYLVANIA PACKET (Philadelphia, PA), Sept. 15, 1778, p. 4. The same advertisement later ran in a subsequent edition of that newspaper. THE PENNSYLVANIA PACKET (Philadelphia, PA), Sept. 26, 1778, p. 4; *see also* THE PENNSYLVANIA PACKET (Philadelphia, PA), Dec. 19, 1778, p. 3 (noting "Beccaria on Crimes, may be had at BELL's Book-Store, next door to St. Paul's Church, in Third-street, Philadelphia").

⁷⁹ RICHARD B. SHER, *THE ENLIGHTENMENT AND THE BOOK: SCOTTISH AUTHORS AND THEIR PUBLISHERS IN EIGHTEENTH-CENTURY BRITAIN, IRELAND AND AMERICA 571-72* (Chicago: The University of Chicago Press, 2006); THE PENNSYLVANIA PACKET

before, during and after the U.S. Constitution's ratification period,⁸⁰ with robust sales of *On Crimes and Punishments* continuing long thereafter in both European and American circles.⁸¹

(Philadelphia, PA), June 24, 1786, p. 4 (the bookseller William Prichard "Begs leave to inform the Gentlemen of the LAW, that he has just received the following most excellent professional AUTHORS, viz. . . . Beccaria on crimes and punishments"); "New Books for Sale at Rice's," THE PENNSYLVANIA PACKET (Philadelphia, PA), Mar. 16, 1787, p. 4 (noting that "Beccaria's essay on crimes and punishments" was for sale at "RICE's BOOK-STORE and MUSIC Shop, Market, near Second street"); "Imported in the late vessels from London, and to be sold by Joseph Crukshank," THE PENNSYLVANIA PACKET (Philadelphia, PA), May 18, 1787, p. 4 (advertising "Beccaria on crimes & punishments" for sale); "Imported in the late vessels from London, and to be sold by Joseph Crukshank," THE PENNSYLVANIA PACKET (Philadelphia, PA), May 24, 1787, p. 4 (advertising "Beccaria on crimes & punishments" for sale); "Law," THE PENNSYLVANIA PACKET (Philadelphia, PA), June 30, 1787, p. 4 ("Just Imported from London and Dublin, and to be SOLD by William Prichard . . . Beccaria on crimes and punishments").

⁸⁰ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 88-92; *see also* "Law Books, &c. for Sale by Rice and Co.," THE PENNSYLVANIA PACKET (Philadelphia, PA), Dec. 1, 1787, p. 3 (advertising "Beccaria on crimes and punishments" by Rice and Co., "Booksellers and Stationers, South Side of Market-street, next door but one to Second-street"); "Books Lately imported, and to be Sold by Joseph Crukshank," THE PENNSYLVANIA PACKET, June 14, 1788, p. 3 (advertising "Beccaria on crimes and punishments" for sale). The U.S. Constitution was ratified on June 21, 1788. ROBERT A. BRADY, THE CONSTITUTION OF THE UNITED STATES 1 (Washington, DC: Government Printing Office, 2007).

⁸¹ "Books Lately imported, and to be Sold by Joseph Crukshank," THE PENNSYLVANIA PACKET (Philadelphia, PA), June 27, 1788, p. 4 (advertising "Beccaria on crimes and punishments"); "Books Lately imported, and to be Sold by Joseph Crukshank," THE PENNSYLVANIA PACKET (Philadelphia, PA), June 30, 1788, p. 4 (same); "This Day is published, and to be sold, by Parry Hall, No. 149, Chesnut-street, near Fourth-street," THE PENNSYLVANIA GAZETTE (Philadelphia, PA), Dec. 5, 1792, p. 4 (listing "Beccaria" for sale); "The following Books, may be had at the Printing-Office of H. Wills," STATE GAZETTE OF NORTH-CAROLINA (New Bern, NC), Dec. 5, 1794, p. 4 (listing "Beccaria on Crimes" for sale in a newspaper printed by Henry Wills, "JOINT PRINTER TO THE STATE WITH A. HODGE"); "For Sale at the Printing-Office, (Newbern) the Following Books," NORTH-CAROLINA GAZETTE (New Bern, NC), Feb. 14, 1795, p. 4 (listing "Beccaria on Crimes" for sale); "A. Hodge has just received from New-York and offers for sale at Raleigh, during the sitting of the Legislature, the following," THE NORTH-CAROLINA JOURNAL (Halifax, NC), Nov. 16, 1795, p. 4 (listing "Beccaria on Crimes" for sale); "New Books," WEEKLY RALEIGH REGISTER (Raleigh, NC), May 19, 1801, p. 3 ("J. GALES has just received from Philadelphia, the following Addition to his Stock of Books, viz. . . . Beccaria on Crimes and Punishments"); "New English Books," RALEIGH REGISTER AND NORTH-CAROLINA STATE GAZETTE (Raleigh, NC), Mar. 30, 1802, p. 1 (offering for sale Beccaria's *On Crimes and Punishments*); "New Books," RALEIGH REGISTER AND NORTH-CAROLINA STATE GAZETTE (Raleigh, NC), Aug. 20, 1804, p. 1 (same); "Just Received, and for Sale at the Office of the Journal," THE NORTH-

c. *The Federalist Papers*

In the haste of their preparation, or, more likely, simply because the proposed U.S. Constitution was an instrument to govern the structure of the *federal* system, *The Federalist Papers* never made explicit mention of Beccaria. At that time, there were only a few federal crimes, with *state* governments—not the *federal* government—playing the predominant role in bringing criminal prosecutions.⁸² The crime of treason came up in Madison’s *Federalist No. 43*, with Madison writing: “As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it.” “But as new-fangled and artificial treasons, have been the great engines, by which violent factions, the natural offspring of free Governments, have usually wrecked their alternative malignity on each other,” Madison warned, “the Convention,” he stressed, assuring New Yorkers, “have with great judgment opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing

CAROLINA JOURNAL (HALIFAX, NC), July 6, 1807, p. 4 (same); THE EVENING POST (New York, NY), Dec. 12, 1810, p. 3 (noting “A VALUABLE COLLECTION of about 1200 volumes of English, French and Italian BOOKS, *London* and *Paris* editions—For sale by JOHN GOURGAS,” including “WORKS OF . . . Beccaria”); “Gould, Banks & Gould,” THE EVENING POST (New York, NY), Mar. 15, 1811, p. 3 (“Have at their Book-stores at New-York and Albany, quantities of the following BOOKS . . . Beccaria on Crimes and Punishments, 1 dol.”); “Book Store,” WESTERN CAROLINIAN (Salisbury, NC), Feb. 22, 1825, p. 3 (noting that Beccaria’s treatise was for sale at Allemong & Locke after “an extensive assortment of *Books* from Philadelphia” were received); “Book Store,” WESTERN CAROLINIAN (Salisbury, NC), Mar. 1, 1825, p. 4 (same).

⁸² The bulk of criminal-law adjudications took place then, as they do now, at the state level. Beccaria’s proportionality principle shows up in various state constitutions. The U.S. Constitution, however, provided only limited enumerated federal authority with respect to the punishment of crime. In Article I, the U.S. Constitution provides that Congress “shall have Power . . . To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Laws of Nations; . . . To provide for organizing, arming, and disciplining, the Militia . . .” U.S. CONST., Art. I, sec. 8.

the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.” “In a confederacy founded on republican principles, and composed of republican members,” Madison concluded, “the superintending government ought clearly to possess authority to defend the system against aristocratical or monarchical innovations.”⁸³

In *Federalist No. 74*, Alexander Hamilton—in another reference to “crime” found in *The Federalist Papers*—wrote about the President’s role as commander-in-chief. Though Hamilton did not explicitly reference Beccaria’s treatise either, it is clear from the text of *Federalist No. 74* that Hamilton was living in the Age of Beccaria. In addressing the proposed power in the U.S. Constitution for the President “to grant reprieves and pardons for offences against the United States,” Hamilton wrote: “Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”⁸⁴ Beccaria’s influence, in truth, is all over the historical record, though not

⁸³ ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* 263-64 (New York: Bantam Dell, 2003). In *Federalist No. 43*, Madison was alluding to a clause in the Constitution that read: “The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.” U.S. Const., art. III, sec. 3, cl. 2.

⁸⁴ ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* 452-53 (New York: Bantam Dell, 2003). On another occasion, Hamilton took note of the fact that “[t]he temper of our country, is not a little opposed to the frequency of capital punishment.” BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 238.

explicitly acknowledged in the *Federalist Papers*. “Many of the revolutionary state constitutions,” writes historian Gordon Wood in *The Radicalism of the American Revolution*, “had promised in Beccarian fashion to end punishments that were ‘cruel and unusual’ and to make them ‘less sanguinary, and in general more proportionate to the crimes.’”⁸⁵ Prohibitions on “sanguinary” punishments—and in favor of “proportionate” punishments—were frequently included in various early American state constitutions, reflecting the sentiment of the day.⁸⁶

Indeed, in *Federalist No. 84*, Alexander Hamilton—in discussing the protections provided in the proposed Constitution for trial by jury and habeas corpus, and against *ex post facto* laws and bills of attainder—struck a very Beccarian chord. As Hamilton wrote: “The creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments have been in all ages the favourite and most formidable instruments of tyranny.” “The observations of the judicious Blackstone,” Hamilton continued, referencing the English jurist who had, in his own *Commentaries on the Laws of England*, praised Beccaria by name, “are well worthy of recital.” Hamilton then quoted Blackstone: “‘To bereave a man of life (says he) or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person by secretly

⁸⁵ GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 193 (New York: Alfred A. Knopf, 1992).

⁸⁶ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 17-18, 21, 192, 256, 263, 373-75 429.

hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.”⁸⁷ Beccaria had also advocated public punishments, an idea largely embraced in America’s founding period. From the 1830s to the 1930s, only after the Founding Fathers had passed from the scene, did Americans move away from public executions to non-public executions behind thick prison walls.⁸⁸

But despite the lack of any explicit mention of *On Crimes and Punishments* in *The Federalist Papers*, Beccaria’s book had not somehow fallen out of favor, not by a long shot; on the contrary, it was a cherished possession in many American households and libraries, including among the founders.⁸⁹ In fact, James Madison reported that, in the eighteenth century, Beccaria was “in the zenith of his fame as a philosophical legislator.”⁹⁰ And Beccaria’s ideas—which, by the time the U.S. Constitution was drafted, had already shaped the Founding

⁸⁷ ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* 522 (New York: Bantam Dell, 2003). In *Federalist No. 15*, Hamilton—in addressing men “who object to the New Constitution”—also wrote of “a principle which has been found the bane of the old,” then spoke of substituting “the violence and sanguinary agency of the sword to the mild influence of the Magistracy.” *Id.* at 84.

⁸⁸ JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 31 (Boston: Northeastern University Press, 1997).

⁸⁹ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 125. Beccaria’s book would remain a popular title—and would continue to be discussed and debated in America and abroad—for decades to come. “Books,” *RALEIGH REGISTER AND NORTH-CAROLINA STATE GAZETTE* (Raleigh, NC), Dec. 19, 1803, p. 4 (noting a donation of Beccaria’s *On Crimes and Punishments* to the University of North Carolina “by the Citizens of Johnson County”); “Mr. Peel’s Improvement of the Criminal Law,” *THE TIMES* (London, England), June 15, 1827, p. 8 (referencing Beccaria); *RALEIGH REGISTER AND NORTH-CAROLINA GAZETTE* (Raleigh, NC), Nov. 25, 1830, p. 4 (quoting Beccaria’s views on pardons and clemency).

⁹⁰ A. Owen Aldridge, “Thomas Jefferson and the Enlightenment: Reflections on Literary Influence,” in WILLIAM G. SHADE, ED., *REVISIONING THE BRITISH EMPIRE IN THE EIGHTEENTH CENTURY: ESSAYS FROM TWENTY-FIVE YEARS OF THE LAWRENCE HENRY GIPSON INSTITUTE FOR EIGHTEENTH-CENTURY STUDIES* 138 (London: Lehigh University Press, 1998).

Fathers' beliefs, as well as many *state* constitutions—were still being regularly bandied about in America.⁹¹ “[I]n every society,” one writer in a Philadelphia newspaper wrote in mid-January 1788, referencing Beccaria’s words during the ratification debate, “there is an effort constantly tending to confer on one part the height and to reduce the other to the extreme of weakness.” “[T]his is of itself,” that writer explained in *The Freeman’s Journal* in a discussion of standing armies, “sufficient to employ the people’s attention.”⁹²

d. U.S. Presidents and Early Americans

In the late eighteenth and early nineteenth centuries, scores of Americans—among them, lawyers and judges and lawmakers, including a wide swath of founders and framers—read, and were influenced by, Cesare Beccaria’s writings.⁹³ George Washington and Thomas Jefferson bought copies of *On Crimes and Punishments*, likely in 1769,⁹⁴ and John Adams passionately quoted

⁹¹ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 564-67.

⁹² “To the People of America,” *THE FREEMAN’S JOURNAL; OR, THE NORTH-AMERICAN INTELLIGENCER* (Philadelphia, PA), Jan. 16, 1788, p. 3; *see also* *THE INDEPENDENT GAZETTEER* (Philadelphia, PA), Mar. 19, 1788, p. 2 (“The dangers of adopting the new constitution having been pointed out, I shall now proceed to consider, whether it would b[e] necessary and proper, and, whether Americans have any good reason to put more conf[ide]nce in their rulers than Europeans. . . . ‘In political arithmetic (says De Beccaria) it is necessary to substitute a calculation of probabilities, to mathematical exactness. That force which continually impels us to our own private interests, like gravity, acts incessantly, unless it meets an obstacle to oppose it.’”).

⁹³ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 151-218; BESSLER, *CRUEL AND UNUSUAL*, *supra* note 66, at 31-58. No matter what side, British loyalist or American revolutionary, or what side of an issue, someone was on, Beccaria’s name would regularly come up. *E.g.*, BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 148; “Suicide,” *THE NORTH-CAROLINA STAR* (Raleigh, NC), Aug. 15, 1823, p. 1 (“Dr. Esquirol (the author of the article on Suicide in the *Dictionnaire*) vehemently opposes the famous Beccaria’s argument against the punishment of *felo de se*’s.”).

⁹⁴ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 91 (Cambridge: Harvard University Press, 2003); LOUIS MASUR, *rites of execution: capital punishment and the transformation of American culture, 1776-1865*, at 175 n.10 (Oxford: Oxford University Press, 1989).

Beccaria in 1770 while representing British soldiers accused of murder following the Boston Massacre. “I am for the prisoners at the bar,” Adams said in an opening line, “and shall apologize for it only in the words of the Marquis Beccaria: ‘If by supporting the rights of mankind, and of invincible truth, I shall contribute to save from the agonies of death one unfortunate victim of tyranny, or ignorance, equally fatal, his blessings and tears of transport shall be sufficient consolation to me for the contempt of all mankind.’”⁹⁵ John Quincy Adams, the son of John Adams, later remarked on the “electrical effect” Beccaria’s words—as spoken by his father—had on courtroom spectators.⁹⁶ Thus, even before America’s Revolutionary War, Beccaria’s treatise had materially influenced the three men—George Washington, John Adams and Thomas Jefferson—who later served as the first three Presidents of the United States.⁹⁷ James Madison, who pushed for penal reform in his home state, had his own exposure to Beccaria’s ideas and, later, as the fourth U.S. President, called for reform of the nation’s criminal law. He asked Congress to mitigate penalties “adopted into it antecedent to experiment” and recommended “a more lenient policy.”⁹⁸

⁹⁵ John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 NW. J. LAW & SOCIAL POLICY 195, 207-08 (2009).

⁹⁶ 71 THE NORTH AMERICAN REVIEW 440 (Boston: Charles C. Little & James Brown, 1850) (reprinting 2 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES, AND ILLUSTRATIONS (Boston: Charles C. Little & James Brown, 1850)).

⁹⁷ REBECCA STEFOFF, *FURMAN V. GEORGIA: DEBATING THE DEATH PENALTY* 29 (Tarrytown, NY: Marshall Cavendish Benchmark, 2008) (“Copies of Beccaria’s book were sold in the American colonies. Thomas Jefferson, George Washington, and John Adams all owned the book, and it appeared in several colonial newspapers.”).

⁹⁸ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 205-9, 344-47.

In early America and under English common law, death sentences were the *mandatory* punishment for certain crimes—and a large number of crimes were punishable by death.⁹⁹ The English “Bloody Code” made scores of offenses punishable by death, and America’s colonial legal system was modeled on that of its mother country, Great Britain.¹⁰⁰ But during the American Revolution, the tide began to turn against capital punishment, in large part because of the influence of Beccaria’s treatise. In 1776, Virginians adopted a Declaration of Rights that prohibited “cruel and unusual punishments”—a provision borrowed from the English Bill of Rights of 1689 and which Virginians Patrick Henry and George Mason viewed as prohibiting torture.¹⁰¹ Between 1776 and 1779, Thomas Jefferson himself drafted a bill in Virginia to make punishments more proportionate to crimes, a bill that Madison advocated for in Virginia but which fell short by a single vote.¹⁰² In the draft legislation, Jefferson cited Beccaria’s treatise multiple times, with Jefferson’s bill seeking to eliminate the death penalty for all crimes except murder and treason.¹⁰³ As University of Texas law professor Jordan Steiker writes: “Many of our founders—including James Madison, Thomas Jefferson, Benjamin Franklin, and Benjamin Rush—were familiar with

⁹⁹ LOUIS J. PALMER, JR., *THE DEATH PENALTY: AN AMERICAN CITIZEN’S GUIDE TO UNDERSTANDING FEDERAL AND STATE LAWS* 14 (Jefferson, NC: McFarland & Co., 1998) (“Mandatory death penalty statutes existed in all of the original 13 colonies prior to the Revolutionary War. Offenses that carried mandatory death sentences included: murder, arson, rape, robbery, burglary, sodomy, piracy, and treason.”).

¹⁰⁰ STEVEN WILF, *LAW’S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA* 139 (Cambridge: Cambridge University Press, 2010).

¹⁰¹ BESSLER, *CRUEL AND UNUSUAL*, *supra* note 66, at 188, 300.

¹⁰² *Id.* at 141.

¹⁰³ *Id.* at 141-42. In fact, after it was published and translated into English in 1767, Beccaria’s treatise—publicized by Blackstone and Voltaire, whose French-to-English commentary on it was regularly reprinted with *On Crimes and Punishments*—steadily grew in popularity on American soil. *Id.* at 39, 56.

Cesare Beccaria's path-breaking critique of the death penalty and accordingly advocated restriction or abolition of capital punishment."¹⁰⁴ The very title of Jefferson's legislation, "Bill for Proportioning Crimes and Punishments," suggests that Beccaria's influence was at work as Jefferson crafted his legislation.¹⁰⁵

As Americans came to despise the English "Bloody Code," they adopted constitutions and declarations of rights that sought to curtail "sanguinary" laws and punishments. Thomas Paine—the American revolutionary whose writings urging independence inspired the Revolutionary War—opposed capital punishment and would argue that it is "sanguinary punishments which corrupt mankind."¹⁰⁶ "Sanguinary"—a word little used in common parlance today but ubiquitous in early America—is, as it was widely understood centuries ago, a synonym for "cruel" and "bloody."¹⁰⁷ In 1776, Maryland delegates approved a declaration specifically providing, "That sanguinary laws ought to be avoided, as far as is consistent with the safety of the State: and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter." Although "sanguinary" does not appear in the English translation of Beccaria's treatise, the accompanying commentary—attributed to Voltaire—does, with that word regularly used in English and American sources to describe harsh sentences, including death sentences.¹⁰⁸

¹⁰⁴ Jordan M. Steiker, *The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism*, 67 U. MIAMI L. REV. 329, 331 (2013).

¹⁰⁵ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 183-84.

¹⁰⁶ *Id.* at 86-87, 108.

¹⁰⁷ *Id.* at 49.

¹⁰⁸ *Id.* at 178; *Jody Lee Miles v. State of Maryland*, No. 36, Md. Ct. App. (Nov. 25, 2013).

American states also enacted provisions prohibiting “cruel and unusual” or “cruel or unusual” punishments, with Pennsylvania’s 1776 constitution taking specific aim—as in Maryland—at “sanguinary” laws. “The penal laws as heretofore used,” read one section of Pennsylvania’s constitution, “shall be reformed by the legislature of this State, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes.” “To deter more effectually from the commission of crimes, by continued visible punishments of long duration,” another section declared, “houses ought to be provided for punishing by hard labour, those who shall be convicted of crimes not capital.”¹⁰⁹ Beccaria pioneered the concept of proportionality, so while Beccaria’s name was not mentioned in Pennsylvania’s 1776 constitution, his ideas can certainly be found there—as well as in a number of other early state constitutions. The requirement of “proportioned” punishments would later appear in state constitutions in places as diverse as Indiana, Maine, Georgia, Rhode Island and West Virginia.¹¹⁰

In truth, Italians such as Beccaria and Philip Mazzei shaped American law in fundamental ways, or, in Luigi Castiglioni’s case, made noteworthy observations on its early history. Their substantial influence and writings should thus not be forgotten. A close friend of Thomas Jefferson, James Madison and many other founders, Philip Mazzei was a trusted friend to the American cause who, during the Revolutionary War, was sent on a mission by Virginians to try to

¹⁰⁹ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 179-81.

¹¹⁰ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 226, 373-74.

secure funds from the Grand Duke of Tuscany.¹¹¹ Like so many of his day, Mazzei was a fan of Beccaria's writings, with Mazzei himself writing of liberty and suggesting that Beccaria be made an honorary member of the Constitutional Society of Virginia. That group, founded in 1784, shortly before the U.S. Constitution's adoption, was established to further "those pure and sacred principles of Liberty, which have been derived to us, from the happy event of the late glorious revolution."¹¹² The Constitutional Society counted among its members luminaries such as James Madison, John Marshall, Richard Henry Lee, Patrick Henry, Edmund Randolph and James Monroe.¹¹³

Luigi Castiglioni—the botanist from Milan—traveled throughout North America for two years in the mid-1780s, traversing through all thirteen original states and leaving shortly before Philadelphia's Constitutional Convention. Castiglioni met with a whole host of American founders, and he developed a strong enough bond with American leaders like Benjamin Franklin that Dr. Franklin later sent Castiglioni—after the Italian botanist returned home—a copy

¹¹¹ Id. at 107-8, 112, 114-15, 118-19, 195-98, 407-9; LUCIANO J. IORIZZO & ERNEST E. ROSSI, EDS., *ITALIAN AMERICANS: BRIDGES TO ITALY, BONDS TO AMERICA* 211 (Youngstown, NY: Teneo Press, 2010); RENÉE CRITCHER LYONS, *FOREIGN-BORN AMERICAN PATRIOTS: SIXTEEN VOLUNTEER LEADERS IN THE REVOLUTIONARY WAR* 14 (Jefferson, NC: McFarland & Co., 2014); "From the Gazette of the United States," *THE NORTH-CAROLINA JOURNAL* (Halifax, NC), May 29, 1797, p. 4; "Jefferson's Life and Times," *N.Y. TIMES*, Aug. 10, 1874, p. 3 ("Virginia sent Mazzei, an Italian of strong Republican sympathies, on a financial mission to the Duke of Tuscany. This was after the Declaration of Independence—in 1778 . . ."); *see also* "Mr. Pickering's Address to the People of the United States," *THE PENNSYLVANIA GAZETTE* (Philadelphia, PA), May 29, 1811, p. 1 ("Mr. Jefferson, in his memorable letter to his friend Mazzei, dared to represent 'the executive power,' meaning WASHINGTON, in whom, as President, the executive power was then vested, 'the judiciary,' and 'all the officers of government,' as engaged in a conspiracy against republicanism!").

¹¹² BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 196.

¹¹³ Id.

of the proposed U.S. Constitution.¹¹⁴ Luigi Castiglioni had initially been made known to Dr. Franklin through a letter of introduction from Paolo Frisi, a mathematician from Milan who knew Cesare Beccaria.¹¹⁵ Writing in Italian in November 1784 from his residence in France, in Passy, Benjamin Franklin—in another letter referencing Castiglioni—had previously sent to another Italian, Lorenzo Manini, translated copies of the early constitutions of the American states. A letter to Franklin from an Italian language teacher, Alphonse Pellegrini, also spelled Pelligrini, referenced Castiglioni, too, with that 1785 letter written in French and specifically taking note of the botanist’s trip to America.¹¹⁶

Just as the Italian botanist Luigi Castiglioni traveled throughout the United States, Beccaria’s fame extended throughout the former British colonies. In the April 14, 1780 edition of *The Maryland Gazette*, published in Annapolis, “A

¹¹⁴ Id. at 12-13, 34, 109-13, 127-32, 215-16; Benjamin Franklin to “Count Castiglione,” Oct. 14, 1787 (Franklin’s letter, sent from Philadelphia, reads in part: “Supposing that a Gentleman who had so much Curiosity respecting the *natural* Productions of our Country, may have some respecting its *political* Productions, I send you enclos’d a Copy of the new federal Constitution propos’d by the Convention of all the States lately held in this City. It is a singular Thing in the History of Mankind, that a great People have had the Opportunity of forming a Government for themselves. This Plan is now to be submitted to the Consideration of separate State Conventions, and probably will be adopted by most if not all of them.”), *available at* www.franklinpapers.org.

¹¹⁵ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 34-37, 127-28; Paolo Frisi to Benjamin Franklin, May 30, 1784 (letter sent in French from Paolo Frisi in Milan to Benjamin Franklin in Passy after Frisi had returned from London, where Frisi had gotten to know Franklin), *available at* www.franklinpapers.org.

¹¹⁶ Benjamin Franklin to Lorenzo Manini, Nov. 19, 1784 & Alphonse Pellegrini to Benjamin Franklin, June 26, 1785, *available at* www.franklinpapers.org; J. S. Ersch, *La France Littéraire Contenant Les Auteurs Français De 1771 à 1796*, at 33 (Hambourg: B. G. Hoffmann, 1798) (referencing Alphonse Pellegrini, described as “*Prof. en Langue italienne et en Cosmographie à Paris*”); A. NORMAN JEFFARES, *IMAGES OF INVENTION: ESSAYS ON IRISH WRITING* 120 (Buckinghamshire: Colin Smythe Limited, 1996) (referencing a “Dr. Alphonse Pelligrini, Professor of Italian at Trinity College, Dublin”); *see also* THEODORE AYRAULT DODGE, ED., *CEREMONY HELD IN PARIS TO COMMEMORATE THE BI-CENTENARY OF THE BIRTH OF BENJAMIN FRANKLIN APRIL 27, 1906*, at 23 (Paris: The Chairman of the Press Committee, 1906) (“Lorenzo Manini created the Cis-Apline Republic and leaned upon the encouraging Franklin.”).

Republican” wrote a letter addressed “To the PEOPLE of MARYLAND.” “THE power of punishing offences, which are merely so, because they are prohibited by the laws of society, in the state of Maryland,” that letter began, “is founded on the contract contained in the declaration of rights and the form of government.” “To this government,” the letter continued, “is also transferred the right of punishing offences against the law of nature, which every individual, in a state of nature, would possess, and which is clearly derived from the principle of self-preservation.” “It is this alone,” the letter writer asserted, “which can justify capital punishment.”¹¹⁷ In *On Crimes and Punishments*, Beccaria had proposed a version of the social compact in which individuals only transferred to the state that portion of their liberty necessary to secure law and order. As one scholar, David Luban, has explained: “Beccaria condemns punishments that are more cruel than is absolutely necessary to deter crime, arguing that on classical-liberal grounds that people in the state of nature will surrender only the smallest quantum of liberty necessary to secure society: ‘The aggregate of these smallest possible portions of individual liberty constitutes the right to punish; everything beyond that is an abuse and not justice, a fact but scarcely a right.’”¹¹⁸

¹¹⁷ “A Republican,” “To the People of Maryland,” Number III, THE MARYLAND GAZETTE (Annapolis, MD), Apr. 14, 1780, p. 1. The letter writer expressed this view: “For the crimes of murder, and high treason, the penalty of death is denounced; and, I think, in these cases the legislature has not exceeded its warrant. He that sheds man’s blood, upon cool, deliberate malice, is guilty of a crime, which strikes at the very being of society.” “High treason, as defined by our treason act,” the writer continued, “is an offence tending to introduce every evil which society was instituted to guard against; it is a crime of deeper malignity than simple murder.” Id.

¹¹⁸ David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1434 (2005).

The views of the Marylander, “A Republican,” were clearly shaped by Beccaria’s writings. “Wherever the necessity of enforcing a law by the death of the transgressor, is not dictated by this ruling principle,” the letter writer continued, referencing Beccaria’s theory of the social compact, “I make no scruple of denying the right of a legislature to take away the life of a human creature.” Asserting that “[a]n excessive severity is moreover so repugnant to common sense,” the writer further contended that “the grand cause of the imperfection in the penal laws is this, they are framed by the rich and powerful, and contrived principally for their own security.”¹¹⁹ Citing the author of *On Crimes and Punishments*, “A Republican” also made this observation: “If my memory does not deceive me, the marquis Beccaria denies the right of capital punishment, because it is not fairly derived from the original compact. He also contends, that the execution of a criminal does not operate so powerfully by way of example as some other punishments, which might in another view contribute to the benefit of the public.”¹²⁰

¹¹⁹ “A Republican,” “To the People of Maryland,” Number III, THE MARYLAND GAZETTE (Annapolis, MD), Apr. 14, 1780, p. 1. As “A Republican” argued: “[I]f a law were proposed, to punish simple fornication by death, there is not a man who would not reject it with anger and disdain; but appeal to a wealthy citizen for his sentiments, with respect to the punishment of a nocturnal thief, and he will tell you at once, that property can never be secure, unless such invaders are cut off from the face of the earth. Hence it is, that truth and justice, the feelings of humanity, and the indelible rights of nature, are so often violated by sanguinary laws.” Id.

¹²⁰ Id. “With due submission to an authority, so much revered by every humane, intelligent, mind,” the letter writer asserted, referencing Beccaria and speaking of society’s power to punish, is a right “derived from a higher source, from the universal principle of self-preservation, which directs us to secure our safety, by the death of that transgressor, who manifests a disposition, beyond the power of human correction, or the probability of amendment.” “These reflections have, with difficulty, reconciled me to the idea of capital punishment,” the writer editorialized, noting, “I am still shocked at the manner, directed by the terrible sentence in high treason; it may be milder than the wheel,

Less than three years before the all-important Constitutional Convention in Philadelphia, *The Pennsylvania Gazette*—in October 1784—published an extensive excerpt from Beccaria’s treatise on “THE OBSCURITY OF LAWS.” These words, the newspaper reported, were “Written by the Marquis BECCARIA, of Milan”:

If the power of interpreting laws be an evil, obscurity in them must be another, as the former is the consequence of the latter. This evil will be still greater, if the laws be written in a language unknown to the people; who, being ignorant of the consequences of their own actions, become necessarily dependent on a few, who are interpreters of the laws, which, instead of being public and general, are thus rendered private and particular. What must we think of mankind, when we reflect, that such is the established custom of the greatest part of our polished and enlightened Europe? Crimes will be less frequent, in proportion as the code of laws is more universally read and understood; for there is no doubt, but that the eloquence of the passions is greatly assisted by the ignorance, and uncertainty of punishments.

Hence it follows, that without written laws, no society will ever acquire a fixed form of government, in which the power is vested in the whole, and not in any part of the society; and in which the laws are not to be altered, but by the will of the whole, nor corrupted by the force of private interest. Experience and reason shew us, that the probability of human traditions diminishes in proportion as they are distant from their sources. How then can laws resist the inevitable force of time, if there be not a lasting monument of the social compact?

Hence we see the use of PRINTING, which alone makes the public, and not a few individuals, the guardians and defenders of the laws. It is this ART, which, by diffusing literature, has gradually dissipated the gloomy spirit of cabal and intrigue. To this ART it is owing, that the atrocious crimes of our ancestors, who were alternatively slaves and tyrants, are become less frequent. Those who are acquainted with the history of the two or three last centuries, may observe, how from the lap of luxury and effeminacy have sprung the most tender virtues, humanity, benevolence, and toleration of human errors. They may contemplate the effects of what was so improperly called, ancient simplicity, and good faith; humanity groaning under implacable

or other infernal engines, invented in some countries in Europe, but every enlightened mind considers these as a disgrace among civilized nations.” Id.

superstition; the avarice and ambition of a few, staining, with human blood, the thrones and palaces of Kings; secret treasons, and public massacres; every noble a tyrant over the people; and the Ministers of the Gospel of Christ bathing their hands in blood, in the name of the God of all Mercy. We may talk as we please of the corruption and degeneracy of the present age, but happily we see no such horrid examples of cruelty and oppression.¹²¹

The notion of publicizing written laws—one taken from Beccaria’s treatise—was embraced by many republican thinkers in that era.¹²² Thomas Jefferson, who copied numerous passages from Beccaria’s treatise, chose excerpts from the fourth chapter of Beccaria’s treatise—the one on interpretation—as the

¹²¹ “Of the Obscurity of Laws,” THE PENNSYLVANIA GAZETTE (Philadelphia, PA), October 20, 1784, p. 2. A little over a month later, *The Pennsylvania Packet* published an “Extract of a letter from Paris, to a gentleman in New York, received by the last French Packet.” The following extract pertaining to Beccaria is found in that letter:

We understand from you with great pleasure, that the system of the *marquis de Beccaria*, is likely to be adopted by several of your legislative assemblies:—to your consideration, to the exalted honor of so many excellent heads may human nature owe the adoption of so useful a branch of legislation: may your bright example cross the atlantic to illuminate some kingdoms in Europe, and serve to expele the remaining shades of our Gothic darkness. We are very glad the states of Massachusetts and New York are likely to be the first to adopt it, and change the punishment of death for public works; I hope that in less than two or three years, your criminal laws will be corrected and amended by able Beccaria’s; if I was with you I should most certainly enrol myself in that sect, and glory in the appellation.

THE PENNSYLVANIA PACKET (Philadelphia, PA), Nov. 24, 1784, p. 3.

¹²² “Reverend O’Leary’s Address to the Common People of Ireland,” THE FREEMAN’S JOURNAL (Dublin, Ireland), Mar. 7, 1786, p. 2:

In foreign countries when new laws, affecting the lives of the people, are enacted, they are posted up on the gates of the churches in all the parishes, and their non-promulgation is pleaded in justification of the fact. This before mentioned conduct corresponds with Beccaria’s wishes, who says, that every citizen should have the code of laws which affect his life: and that the conduct of Censors and Magistrates, who punish the ignorant, is *a kind of tyranny which surrounds the confines of political liberty*. If the laws are made for the people, the people should know them, and laws which affect the lives of the multitude, should not be confined to the lawyer’s library.

first chapter he began copying into his commonplace book as he read the book.¹²³

The long-standing Anglo-American legal doctrine of *nulla poena sine lege*—the idea that no person shall be punished except in pursuance of a statute that fixes a penalty for criminal behavior—can itself be seen as an outgrowth, or at least an embrace, of Beccarian principles.¹²⁴ That Latin maxim has been described as a “fundamental principle” of U.S. law. “In effect,” it has been held, “this means that no one shall be held criminally responsible for conduct which is not specifically forbidden by a statute.”¹²⁵

Under U.S. law today, that ancient maxim has been described as “a requisite of due process.”¹²⁶ As one Massachusetts court put it: “The sense of fairness is that persons subject to the law should have the opportunity, generally or specifically, to know the rules, to understand the consequences of deviation

¹²³ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 182; CHRISTOPHER L. TOMLINS & BRUCE H. MANN, EDS., *THE MANY LEGALITIES OF EARLY AMERICA* 116 (Chapel Hill: University of North Carolina Press, 2001) (published for the Omohundro Institute of Early American History and Culture, Williamsburg, Virginia).

¹²⁴ Jerome Hall, *Nulla Poena Sine Lege*, 47 *YALE L. J.* 165, 165 (1937); *see also id.* (“Employed as *nullum crimen sine lege*, the prohibition is that no conduct shall be held criminal unless it is specifically described in the behavior-circumstance element of a penal statute. In addition, *nulla poena sine lege* has been understood to include the rule that penal statutes must be strictly construed. A final, important signification of the rule is that penal laws shall not be given retroactive effect.”); *id.* at 177 (“The rule of strict construction of penal statutes played a peculiar and important role in eighteenth century England when a humanitarian ideology propagated by Beccaria, Romilly, Howard, Buxton and others rose against a severe and indiscriminating written law.”); *id.* at 168-69:

Long before the French Revolution, the movement for codification had advanced some of the ideas underlying *nulla poena* on its technical side. Indeed, it was in the Code of the Austrian monarch, Joseph II, (1787) that specific prohibition of analogy first entered the modern criminal law. The English tradition of the rule of law, translated by eighteenth century French philosophers into terms expressive of the Revolutionary ideology, joined with the continental movement for codification to provide *nulla poena* with its particular, current meanings.

¹²⁵ *F. & A. Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180, 184 (S.D. Cal. 1951).

¹²⁶ *United States v. Bodiford*, 753 F.2d 380, 382 (5th Cir. 1985).

from them, and to behave accordingly. In criminal law the maxim is *nulla poena sine lege*.” As that court added: “The constitutional prohibition against retroactive or ex post facto criminal litigation serves this policy of fairness.”¹²⁷ Another court put it this way: “The maxim *nullum crimen sine lege, nulla poena sine lege* reminds us that the courts may not punish conduct as criminal unless that conduct has transgressed the clear, plain, or fair meaning of the defined offense. In the federal courts, this means a congressionally defined offense, because there is no federal common law of crimes.”¹²⁸

e. The Impact of Beccaria’s Treatise

The wide-ranging influence of Beccaria’s book on American law can be gleaned from a 1786 letter that William Bradford, Jr., then Pennsylvania’s attorney general, sent to Luigi Castiglioni, an Italian botanist, while Castiglioni was touring the United States in the mid-1780s.¹²⁹ Castiglioni—the nephew of Pietro and Alessandro Verri, the brothers from Milan who had inspired Beccaria

¹²⁷ *Apostolopoulos v. Massachusetts Registry of Motor Vehicles*, 21 Mass. L. Rptr. 616, No. 2006-3623-A *5 (Mass. Sup. Ct. 2006).

¹²⁸ *United States v. Davis*, 576 F.2d 1065, 1069 (3d Cir. 1978); *see also* *State of Maryland v. Kramer*, 318 Md. 576, 582 (Md. Ct. App. 1990) (“‘Basic to our theory of justice is the principle that there can be no punishment for harmful conduct unless it was so provided by some law in existence at the time.’ This is expressed in the maxim *nullum crimen sine lege, nulla poena sine lege* (no crime or punishment without law).”); *Nunley v. State of Alaska*, 26 P.3d 1113, 1116 (Alaska Ct. App. 2001) (“[O]ne of the cardinal principles of our law is *nullum crimen sine lege, nulla poena sine lege*—the principle that no person shall suffer criminal punishment unless the legislature (or an agency with power delegated by the legislature) has enacted a statute or regulation that makes the person’s conduct a crime.”); *Bynum v. State of Texas*, 767 S.W.2d 769, 773 n.5 (Tex. Crim. Ct. App. 1989) (“The principle of ‘legality,’ or *nulla poena sine lege*, condemns judicial crime creation.”).

¹²⁹ ANTONIO PACE, ED., *LUIGI CASTIGLIONI’S VIAGGIO: TRAVELS IN THE UNITED STATES OF NORTH AMERICA 1785-1787*, at 313-14 (Syracuse, NY: Syracuse University Press, 1983).

to write *On Crimes and Punishments* in the first place¹³⁰—had come to America to study trees and plants and to get a glimpse of American life.¹³¹ In his letter, Bradford—a close friend of James Madison from their days together at the College of New Jersey, now Princeton—heaped praise upon *On Crimes and Punishments*, with Bradford giving Castiglioni a newly printed American edition of Beccaria’s book.¹³² President George Washington later appointed Bradford as the second Attorney General of the United States, so Bradford’s status as an historical figure goes well beyond his personal relationship with James Madison, America’s fourth President.¹³³

In presenting the newly printed edition of Beccaria’s treatise, William Bradford—who believed Castiglioni to be *Beccaria’s* nephew—wrote: “It is a new proof of the veneration my countrymen harbor for the opinions of your famous relative. I should like it to be known by the author of this book, so well received in the Old World, that his efforts to extend the domain of humanity have been crowned in the New World with the happiest success.” “Long before the recent Revolution,” Bradford explained in his letter, “this book was common among lettered persons of Pennsylvania, who admired its principles without daring to hope that they could be adopted in legislation, since we copied the laws of England, to whose laws we were subject.” “However,” Bradford continued, “as soon as we were free of political bonds, this humanitarian system, long

¹³⁰ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 35-36.

¹³¹ PACE, ED., LUIGI CASTIGLIONI’S VIAGGIO, *supra* note 129, at xii, xxix-xxxiv.

¹³² *Id.* at 313-14.

¹³³ ROBERT A. NOWLAN, THE AMERICAN PRESIDENTS, WASHINGTON TO TYLER: WHAT THEY DID, WHAT THEY SAID, WHAT WAS SAID ABOUT THEM, WITH FULL SOURCE NOTES 165 (Jefferson, NC: McFarland & Co., 2012).

admired in secret, was publicly adopted and incorporated by the Constitution of the State, which, spurred by the influence of this benign spirit, ordered the legislative bodies to render penalties less bloody and, in general, more proportionate to the crimes.”¹³⁴ In continental Europe, Beccaria’s treatise had already been praised by Voltaire and garnered the attention of monarchs such as Frederick II of Prussia, Louis XVI of France, and Catherine II of Russia.¹³⁵ For example, King Louis XVI—influenced by Beccaria’s essay—abolished “preparatory” torture in 1780 and “preliminary” torture in 1788.¹³⁶

The impact of *On Crimes and Punishments* on the American psyche is clear. In William Bradford’s 1786 letter to Luigi Castiglioni, Bradford specifically emphasized: “The name of Beccaria has become familiar in Pennsylvania, his authority has become great, and his principles have spread among all classes of persons and impressed themselves deeply in the hearts of our citizens.” “You yourself must have noticed the influence of these precepts in other American states,” Bradford wrote, aware that Castiglioni had been traveling throughout the American states on his overseas trip.¹³⁷ Castiglioni, in fact, would spend more than two years in North America, visiting places as diverse as New York and Georgia and Virginia and Vermont.¹³⁸ Castiglioni had been introduced to Benjamin Franklin by Paolo Frisi, one of the members of the Society of Fists,

¹³⁴ PACE, ED., LUIGI CASTIGLIONI’S VIAGGIO, *supra* note 129, at 313-14.

¹³⁵ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 33, 39.

¹³⁶ ROBERT A. SILVERMAN, TERENCE P. THORNBERRY, BERNARD COHEN & BARRY KRISBERG, EDS., CRIME AND JUSTICE AT THE MILLENNIUM: ESSAYS BY AND IN HONOR OF MARVIN E. WOLFGANG 391 (Dordrecht: The Netherlands: Kluwer Academic Publishers, 2002).

¹³⁷ PACE, ED., LUIGI CASTIGLIONI’S VIAGGIO, *supra* note 129, at 314.

¹³⁸ *Id.* at 1-269; BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 12, 14, 105, 109-12, 128-30.

the self-described “Coffeepot Society” of mostly young men that included the Verri brothers, Cesare Beccaria, and other Italians such as Gian Battista Biffi, Gian Rinaldo Carli, Sebastiano Franci, Luigi Lambertenghi, Alfonso Longo and Giuseppe Visconti.¹³⁹ According to one historian, the name of the society started by Pietro Verri “derived specifically from gossip circulated around Milan in the summer of 1763, according to which Verri and Beccaria had resolved an intellectual dispute by resorting to ‘powerful punches,’ giving life to the idea of an *Academy of Punches*.”¹⁴⁰

Writing of Beccaria’s influence in America, Bradford explained in his 1786 letter: “The tyranny of prejudice and injustice has fallen, the voice of a philosopher has stilled the outcries of the masses, and although a bloody system may still survive in the laws of many of our states, nevertheless the beneficent spirit sown by Beccaria works secretly in behalf of the accused, moderating the rigor of the laws and tempering justice with compassion.”¹⁴¹ The “bloody system” to which Bradford referred—one peppered with capital crimes, whether based upon English common-law traditions, interpretations of Old Testament passages, or the decrees of kings—was the one Americans had originally inherited from England, and one that used executioners to carry out its deadly directives.¹⁴² In his little-known Italian travelogue, published in Milan in 1790 but only translated into English in 1983 as *Viaggio: Travels in the United States of North*

¹³⁹ Reinert, *supra* note 35, at 131.

¹⁴⁰ Id. at 132.

¹⁴¹ PACE, ED., LUIGI CASTIGLIONI’S VIAGGIO, *supra* note 129, at 314.

¹⁴² 1 DAVID LEVINSON, ED., *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* 153 (Thousand Oaks, CA: Sage Publications, 2002).

America, 1785-1787,¹⁴³ Luigi Castiglioni made special note of sections 38 and 39 of the Pennsylvania Constitution. Those sections of Pennsylvania's constitution dealt with the penal reform inspired in part by Cesare Beccaria's *On Crimes and Punishments*.¹⁴⁴

The American Revolution was imbued with Beccarian impulses. Beccaria's name, however, was omitted from *The Federalist Papers*—a source that has gotten an outsized reputation as the Holy Grail of American constitutional history.¹⁴⁵ Although the three men who penned *The Federalist Papers*—James Madison, Alexander Hamilton and John Jay—embraced the Enlightenment, their collective oversight in not mentioning Beccaria in those essays, had unintended consequences. The unintended result: Beccaria's reputation has suffered immensely over time. In 1807, though, when the founders were still with us, a town in Pennsylvania was named after Cesare Beccaria in recognition of his impact on American thought.¹⁴⁶ *The Federalist Papers* are important documents to be sure; they represent, however, only one source of many from the founding

¹⁴³ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 12.

¹⁴⁴ *Id.* at 373.

¹⁴⁵ KYLE SCOTT, *THE FEDERALIST PAPERS* 41 (New York: Bloomsbury Academic, 2013) (“Originally written as newspaper articles, the intended purpose of the papers was to provide an argument for the ratification of the Constitution; to persuade the people of New York to adopt the new document.”); *compare* ROBERT W. T. MARTIN, *GOVERNMENT BY DISSENT: PROTEST, RESISTANCE AND RADICAL DEMOCRATIC THOUGHT IN THE EARLY AMERICAN REPUBLIC* 15 (New York: New York University Press, 2013) (“The famed *Federalist Papers* (1787-88) may have played a minor role in the actual ratification struggle, but they provided—then as now—the most penetrating and insightful defense of America's ‘complicated system’ of popular government.”).

¹⁴⁶ Henry W. Shoemaker, “This Morning's Comment,” *ALTOONA TRIBUNE* (Altoona, PA), May 4, 1949, p. 4 (“Residents of Italian origins in Beccaria town and township, Clearfield county, through which Clearfield creek flows, are busy these days working out a program to honor the 160th anniversary of the death of Cesar Bonesana Beccaria, the great political economist of Italy, who originated the phrase, ‘the greatest happiness to the greatest number.’”).

period. Originally, those short essays were intended to serve a much more limited purpose—to facilitate the Constitution’s ratification in New York—than is often ascribed today. Because crimes were mostly delineated and punished at the state, not the federal level, the rather understandable omission of Beccaria from *The Federalist Papers* has made Montesquieu, not Beccaria, the intellectual star. To modern-day Americans just reading *The Federalist Papers*, it might appear as if the founders never read Beccaria at all and that Montesquieu—almost single-handedly—inspired Madisonian democracy and America’s system of government.

There is, of course, no denying that Montesquieu’s ideas played a pivotal role in shaping America’s Constitution, especially as regards its system of checks and balances.¹⁴⁷ The U.S. Constitution, in setting up America’s system of government, established the three branches of government: the legislative branch (Congress), the executive branch (the presidency), and the judiciary (the U.S. Supreme Court). But the founders did read Beccaria, and Beccaria’s equally noteworthy contributions—focused on making laws just, clear, and less severe, and seeking to achieve a more uniform application of written law, a foundation of the Rule of Law—have been inexplicably downplayed or forgotten altogether.¹⁴⁸ Not only did Beccaria’s treatise inspire the drafters of early state constitutions and laws to make punishments less severe, but that treatise touted the benefits of “a fixed code of laws” that would leave judges “no other task than to examine the

¹⁴⁷ MICHAEL A. GENOVESE, *ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY* 348 (New York: Facts on File, 2014) (“Montesquieu’s *The Spirit of Laws* was one of the most important influences on the authors of the U.S. Constitution. In particular, Montesquieu’s conception of the separation of powers played a key role in determining the proper role of the president of the United States.”).

¹⁴⁸ See *supra* note 30.

actions of citizens and to judge whether or not they are consistent with the law as written.” “[W]ithout writing,” Beccaria emphasized, “a society will never achieve a fixed form of government in which power is a product of the whole rather than the parts, and in which laws—unalterable except by the general will—are not corrupted as they wade through the throng of private interests.”¹⁴⁹

III. HOW ITALIAN REPUBLICANISM HELPED TO CATALYZE THE AMERICAN REVOLUTION

a. American Fascination with Italy and the *Illuminismo*

Long before the Revolutionary War, Americans paid attention to Italian history and, through letters and newspapers, to events unfolding there. For example, in a letter to George Washington sent from Leghorn on April 29, 1765, Andrew Burnaby—who had spent time at Mount Vernon—expressed the wish that Washington himself might come to the Italian port “where we would shew You a new World . . . with many beauties and much Welcome.” “I have got an excellent house, and should enjoy it more than I have ever yet done, if I could have the satisfaction of your Company,” Burnaby told Washington, noting that “[a]t present we are making great preparations here for the arrival of the Arch-Duke and Duchess.” “[T]he Italians,” he said, “have a remarkable turn for Splendor and Shew,” emphasizing that “the Tuscans . . . are . . . the most accomplish’d People of the Whole County.” In reporting other news from the area, Burnaby added:

¹⁴⁹ THOMAS, ED., *ON CRIMES AND PUNISHMENTS*, *supra* note 2, at 15-16; *see also* Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium*, 86 CHI.-KENT L. REV. 613, 616 n.18 (2011) (“In Italy, Enlightenment thinkers Cesare Beccaria and Gaetano Filangieri shared Montesquieu’s views and sought to make the judge’s role as mechanistic and automatic as possible.”).

The Corsicans in this part of the World are a Subject of Very interesting Conversation, though possibly in Yours they may be as little talked of, as the Indians are except by the English in this. Paoli will have no intercourse with the French garrison, nor will Suffer the Islanders to Supply them with Any provisions. The French common Soldiers desert to him in great Numbers.¹⁵⁰

The Italian-speaking Pasquale Paoli (1725-1807), a Corsican leader and revolutionary, was, in fact, the source of much inspiration to America's founders. The Corsican Republic was a representative democracy led by a General Diet that met annually and by an executive committee, of which General Paoli—the country's commander-in-chief—was president. Paoli, the Corsican patriot who rose to power in 1755 after summoning islanders to proclaim a constitution, reportedly carried Montesquieu's works about with him.¹⁵¹ The Genoese had long sought to control the island, but Paoli—who ruled from 1755 to 1769—sought to forge a permanent republic and new laws. He founded a college, instituted a system of public education, and encouraged agricultural production. He also drove the Genoese from every port except Bastia. Although the Genoese were unsuccessful in dislodging him, Paoli had been forced to take refuge in England in 1769 after his countrymen battled more powerful French forces, an army of 22,000 men, who seized control of Corsica and defeated Paoli's troops. The island—the home of many patriotic Corsicans—had been ceded to France by a frustrated and embattled Genoa in 1768, and the final battle, at Ponte Nuovo, was lost in 1769, leading to Paoli's exile in England after his narrow escape following fierce fighting. In England, Paoli became—as one scholar puts it—"a part of the

¹⁵⁰ Andrew Burnaby to George Washington, Apr. 19, 1765, *available at* wwwFOUNDERS.archives.gov.

¹⁵¹ H. G. KOENIGSBERGER, *POLITICIANS AND VIRTUOSI: ESSAYS IN EARLY MODERN HISTORY* 61 (London: The Hambledon Press, 1986).

English-Irish-American radical movement.” The Scottish writer James Boswell, who wrote *An Account of Corsica*, had made General Paoli famous throughout the world. Boswell had gone to Corsica in the mid-1760s and befriended Paoli. Boswell became sympathetic to his quest for independence, and through Boswell’s book, Paoli’s fame spread.¹⁵²

For example, in the October 3, 1768 edition of the *Boston Gazette*, Josiah Quincy Jr.—writing as “Hyperion”—wrote these words: “Oh my countrymen! what will our children say, when they read the history of these times, should they find we tamely gave away the most invaluable earthy blessings? As they drag the galling chain, will they not execrate us?” “If we have any respect for things sacred, any regard to the dearest treasure on earth, if we have one tender sentiment for posterity, if we would not be despised by the whole world,” he pleaded, “let us in the most open, solemn manner, and with the determined fortitude of a Corsican, swear, *We will die, if we cannot live Freemen.*” According to the editors of Josiah Quincy Jr.’s writings, Pasquale Paoli—the Corsican Quincy referred to—“had become a famous figure, in some sense the darling of his age in certain social circles, especially in London, where he would soon be living in exile.” Quincy had just bought a copy of Boswell’s recently

¹⁵² HERBERT APTHEKER, *THE AMERICAN REVOLUTION 1763-1783*, at 161 (New York: International Publishers, 1960); JAMES BOSWELL, *AN ACCOUNT OF CORSICA, THE JOURNAL OF A TOUR TO THAT ISLAND, AND MEMOIRS OF PASCAL PAOLI* (London: Edward and Charles Dilly, 1768); “Corte of Corsica,” *SAN FRANCISCO CHRONICLE* (San Francisco, CA), Jan. 27, 1889, p. 1; “Glimpse of Corsica,” *AKRON DAILY DEMOCRAT* (Akron, OH), Sept. 30, 1899, p. 8; “Corsica and De Paoli,” *THE BUCKS COUNTY GAZETTE* (Briston, PA), Sept. 18, 1914, p. 4; A. W. Macy, “Curious Bits of History: A Great Corsican Patriot,” *THE BEDFORD GAZETTE* (Bedford, PA), May 5, 1916, p. 3; Editorial note 4, Committee of the Boston Sons of Liberty to John Wilkes, Nov. 4, 1769, available at wwwFOUNDERS.archives.gov.

published *An Account of Corsica* (1768), which explains Quincy's use of it in his own writing.¹⁵³

After the British Parliament passed the Stamp Act in 1765, imposing a direct tax on various printed materials, including legal papers, colonial newspapers and magazines, even playing cards, the American colonists—livid about being taxed without their consent—rose up in opposition to the unpopular tax.¹⁵⁴ During the summer of 1765, Boston merchants, artisans and a ship's captain, calling themselves "The Loyal Nine," began agitating against the loathed British law with a view to obtaining its repeal. Their grassroots effort was effective, and the group soon morphed into the Sons of Liberty, with some members resorting to violence and intimidation tactics to accomplish the group's objectives. On August 14, 1765, two effigies were found hanging from an elm tree in Boston's South End. One effigy was of Andrew Oliver, the designated "Distributor of Stamps" for Massachusetts, and the other, of a boot, a pun on the Earl of Bute's name, had a devil climbing out of it. The third Earl of Bute, John Stuart, was a favorite minister of George III but was despised in America. After a large crowd formed, local authorities were dissuaded from taking down the effigies, and at dusk, the emboldened mob ended up destroying a new building that Andrew Oliver had under construction that was rumored to be a future office for carrying out the Stamp Act's mandate. After heading off to start a celebratory bonfire to burn the effigies, the mob broke several windows at Oliver's mansion

¹⁵³ 6 DANIEL R. COQUILLETTE & NEIL LONGLEY YORK, EDS., *PORTRAIT OF A PATRIOT: THE MAJOR POLITICAL AND LEGAL PAPERS OF JOSIAH QUINCY JUNIOR* 26-28 nn.1, 4 (Boston: The Colonial Society of Massachusetts, 2007).

¹⁵⁴ JOEL WALKER & DONALD O. STEWART, *THE SOUTH CAROLINA ADVENTURE* 116 (Layton, UT: Gibbs Smith, 2005).

and took parts of his fence for firewood. Fueled by liquor, the unruly crowd later returned to Oliver's home and throw stones at it for half an hour. "Then," as one historian puts it, "some of the more enthusiastic members of the gathering entered the house—after having 'tore down his privy,' and 'ruined his flowers and fruit trees'—and began to drink the 'stamp master's' liquor, while 'throwing chinaware, silver, and furniture about the house.'"¹⁵⁵

Beccaria's book was published in Italian in 1764, and the first Stamp Act riot—the one in Boston that caused so much damage to Andrew Oliver's property and possessions—took place in close proximity, in mid-August 1765, as the colonists' anger at British abuses swelled. While the Sons of Liberty, totally apart from Beccaria's book, had their own grievances against the British Crown and the British Parliament, that book's appearance, especially once translated into English, the colonists' native tongue, would further fuel the fire of the colonists' discontent. *On Crimes and Punishments* forcefully articulated the injustice of tyrannical practices, and that central message of Beccaria's book was one colonists found appealing. Indeed, by 1767, the same year that Beccaria's book was translated into English, the unrest—the revolutionary fervor in the American colonies—was clear. Writing from Boston on May 7, 1767, Andrew Oliver penned these words to Benjamin Franklin, then in London: "I am very sorry that the colonies give you so much employment, and it is impossible to say how long it will be before things settle into quiet among us. We have some here who have been so busy in fomenting the late disturbances, that they may now think it

¹⁵⁵ ANDREW STEPHEN WALMSLEY, *THOMAS HUTCHINSON AND THE ORIGINS OF THE AMERICAN REVOLUTION* 65, 69 (New York: New York University Press, 1999).

needful for their own security to keep up the spirit.” Oliver reported some colonists’ celebratory mood on the first-year anniversary of the Stamp Act riot that had taken place in Boston on August 14, 1765, and that had so affected him, taking note of “the first anniversary commemoration of what they had done at the tree of liberty on that day the year before.” Relaying that colonists “have plumed themselves much upon the victory they have gained,” Oliver added of what had been done the year before at the liberty tree, a famous elm tree near Boston Common: “Here a number of respectable gentlemen as they inform us now met, and among other toasts drank general Paoli, and the spark of liberty kindled in Spain.”¹⁵⁶

A January 1768 letter to *The Gentleman’s Magazine*—attributed to Benjamin Franklin, but written under the pseudonym “A. B.”—pointed to the growing unrest in the British colonies. “The British state or empire consists of several islands and other distant countries, asunder in different parts of the globe, *but all united in allegiance to one Prince*, and to the *common law* (Scotland excepted) as it existed in the old provinces or mother country, before the colonies or new provinces were formed.” After taking note of separate assemblies in British colonies, “A. B.”—the likely pseudonym for Dr. Franklin—speculated that “the allegiance of the distant provinces to the crown will remain for ever unshaken, while they enjoy the rights of Englishman; that is, with the consent of their sovereign, the right of legislation each for themselves; for this puts them on an exact level, in this respect, with their fellow subjects in the old provinces, and

¹⁵⁶ Andrew Oliver to Benjamin Franklin, May 7, 1767; DAVID T. MORGAN, *THE DEVIOUS DR. FRANKLIN, COLONIAL AGENT: BENJAMIN FRANKLIN’S YEARS IN LONDON* 143 (Macon, GA: Mercer University Press, 1999).

better than this they could not be by any change in their power.” “But if the old provinces should often exercise the right of making laws for the new,” A. B. concluded, “they would probably grow as restless as the Corsicans, when they perceived they were no longer fellow subjects, but the subject of subjects.”¹⁵⁷

In May 1768, the Genoese—as the editors of Benjamin Franklin’s papers note of Corsica—“had abandoned their prolonged effort to maintain sovereignty over the island and had sold it to France; for the next year the Corsicans under Pasquale Paoli held out against this new and mightier enemy, but by the summer of 1769 the French had gained firm control.”¹⁵⁸ Early that year, in late January 1769, Benjamin Franklin, writing from London, sent a letter to fellow Pennsylvanians Charles Thomson and Thomas Mifflin about books ordered for the Library Company of Philadelphia. Among the new books Philadelphians would have had access to at that time that are mentioned in the Franklin Papers pertaining to that exchange: Giuseppe M. A. Baretti’s *An Account of the Manners and Customs of Italy: with Observations on the Mistakes of Some Travellers* (London, 1768); Cesare Beccaria’s *An Essay on Crimes and Punishments, Translated from the Italian; with a Commentary attributed to Mons. de Voltaire, Translated from the French* (London, 1767); Samuel Sharp’s *Letters from Italy; Describing the Customs, Manners, Drama, etc. of Italy . . . as They Are Described . . . by Mr. Baretti* (London, 1768); Laurence Sterne’s *A Sentimental Journey through France and Italy, by Mr. Yorick* (new ed., 2 vols., London, 1768) and

¹⁵⁷ “Subjects of Subjects,” THE GENTLEMAN’S MAGAZINE (1768), pp. 6-7, available at wwwFOUNDERS.archives.gov.

¹⁵⁸ “A Horrid Spectacle to Men and Angels,” [Before 17 January 1769], available at wwwFOUNDERS.archives.gov.

James Boswell's *An Account of Corsica; the Journal of a Tour to that Island; and Memoirs of Pascal Paoli* (2d ed., London, 1768).¹⁵⁹

In February 1769, Thomas Gordon, of Philadelphia, himself corresponded with Franklin, with Gordon noting in his letter that Franklin's prior "kindness" to Gordon's son Alexander in England—his son had run out of money, and Franklin helped—"[e]ncourages me now to Apply in behalf of my Son in Law Henry Benbridge, a very Deserving youth who has been Several Years in Italy for his improvement in Painting, and is now going to London for Business." Benbridge, Gordon's step-son, had been in Italy for approximately four years and was coming to England via Corsica with a portrait of Pasquale Paoli he had painted on commission for James Boswell, the author of *An Account of Corsica*.¹⁶⁰ The portrait of Paoli was exhibited in London, and Benbridge—a Philadelphian who had studied art in Italy like Benjamin Franklin's friend Benjamin West—did a portrait of Franklin himself after arriving in London. Around the same time, in a July 19, 1770 letter written from London to Deborah Franklin, Benjamin Franklin—addressing his wife as "My dear Child"—refers to "our ingenious Countryman Mr. Benbridge" as having "so greatly improv'd himself in Italy as a

¹⁵⁹ Benjamin Franklin to Charles Thomson and Thomas Mifflin, Jan. 27, 1769, *available at* wwwFOUNDERS.archives.gov.

¹⁶⁰ Thomas Gordon to Benjamin Franklin, Feb. 5, 1769, *available at* wwwFOUNDERS.archives.gov; GLENN WEAVER, *THE ITALIAN PRESENCE IN COLONIAL VIRGINIA* 57 (New York: Center for Migration Studies, 1988) ("In 1762, at the age of 21, Henry Benbridge of Philadelphia went to Rome to study art. In 1768, he was commissioned by James Boswell to go to Corsica to paint a full-length portrait of Pasquale Paoli, the Corsican revolutionary who had captured the imagination of Englishmen and colonials.").

Portrait Painter, that the Connoisseurs in that Art here think few or none excel him.”¹⁶¹

The conflict in Corsica appears in Benjamin Franklin’s own writings.¹⁶² And Paoli’s name also appears in correspondence between Boston’s Sons of Liberty and John Wilkes, an Englishman who had been elected to the British Parliament but whom England’s king and the Parliament itself refused to seat.¹⁶³ On November 4, 1769, the Committee of the Boston Sons of Liberty—made up of James Otis, Samuel Adams, John Hancock, Joseph Warren, John Adams and Josiah Quincy Jr., among others—sent a lengthy letter to Wilkes that read in part:

We yet too sensibly feel the loss of every right, liberty and privilege, that can distinguish a *Freeman* from a *Slave*, not to sympathize in the most tender manner with you, in the conflicts you have been so long engaged in, and in the sufferings you now severely labor under, so far as we can judge, only for a *firm* and *intrepid* opposition to ministerial despotism. We easily perceive the causes and motives of that relentless and unremitted ardor and fury with which you are persecuted. It is not more for your own sake, than for the invincible resolution with which you have supported the cause of liberty, and of Mankind.

With us also the laws seem to lie prostrate at the foot of power. Our City is yet a Garrison filled with armed Men, as our harbour is with Cruizers, Cutters and other armed Vessells. A main guard is yet placed at the doors of our State house. The other side of the Exchange is turned into a guarded den of Revenue officers to plunder our trade, and drain the Country of its money, not only without our consent, but against repeated remonstrances. The Military are guilty of all kinds of licentiousness. The public streets are unsafe to walk in for either sex, by night or by day. Prosecutions, Civil and Criminal against the inhabitants, are pushed with great rancor and rigor; while those against the troops, and the revenue officers, and their confederates are frowned upon and embarrassed, by every possible means in the power of those

¹⁶¹ Benjamin Franklin to Deborah Franklin, July 19, 1770, *available at* wwwFOUNDERS.archives.gov.

¹⁶² Franklin Papers, “Dialogue between Britain, France, Spain, Holland, Saxony and America [1774-75], *available at* wwwFOUNDERS.archives.gov.

¹⁶³ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 81-87.

who are inimical to the rights of the subject. . . . Such, without exaggeration, is the present wretched state of the once happy and flourishing City of Boston. Such in a degree, is the state of all our trading towns, and such in effect, is the state of the whole Continent: This would be intolerable had England been really at the expence of settling and defending the ancient Colonies: For even that would not have deprived us of the rights of men, or the freedom of Citizens.

. . . . And we all know that a strong squadron from Brest with Troops have a chance of a passage to Quebec, while a Fleet if ready may be beating out of the English Channell. Forewarn'd, Forearm'd! The French and Spaniards never will forget nor forgive the severe *drubbing* they received in the last War. And from all appearances, it is much to be apprehended, the parties to the family compact are meditating some great blow, and are as likely to strike in North America as in Corsica. Perhaps that very expedition was the rather formed against that hero Paoli, but to whet their swords, and discipline the French slaves for the further carnage of the Sons of liberty. Where so likely to begin as in North America? And however light some may make of the loss of Canada, there is reason to fear, should the French ever be suffered to repossess themselves of that Country, the event would soon prove fatal to Britain, if not to the whole British empire. We have not thought it best to publish your letters: You are at liberty to dispose of ours as you think fit.

That you may be soon fully restored to your liberty, your family, your friends, your Country, and to the world; and enjoy all imaginable prosperity, is the ardent wish and fervent prayer of the Friends of Liberty in Boston.¹⁶⁴

b. John Wilkes, the English Constitution, and the Corsican Revolution

John Wilkes himself was seen as “a Martyr to universal Liberty,” with American revolutionaries making toasts to Wilkes and his cause. As the Committee of the Boston Sons of Liberty, with John Adams, Joseph Warren and three others subscribing their names, had written to Wilkes on October 5, 1768: “We feel with fraternal concern, that Europe in a ferment, America on the point of

¹⁶⁴ Committee of the Boston Sons of Liberty to John Wilkes, Nov. 4, 1769, *available at* wwwFOUNDERS.archives.gov.

bursting into flames, more pressingly require the Patriot-senator, the wise and honest Counsellor, than the desolating conqueror. Your noble disdain of inadequate ministers and contemptible salary hunters has by no means impair'd our sense of the dignity of a Freeman, or the importance of defending his minutest privilege against the determined invasion of the most formidable power on earth.” As the Sons of Liberty wrote to Wilkes after complaining of British abuses: “Can Britons wish to see us abandon our lives and properties to such rapine and plunder? To become traitors to that Constitution which for ages has been the citadel of their own safety. To acknowledge fellow subjects for absolute sovereigns, that by our example they may be the more readily reduced to absolute slaves.”¹⁶⁵ The much-vaunted English constitution, the Americans felt, was being trampled upon.¹⁶⁶

Earlier that year, on June 6, 1768, the Committee of the Boston Sons of Liberty had written another letter to Wilkes—the British politician who had been charged with seditious libel in England for publishing *North Briton* “No. 45,” then fled to continental Europe. Before returning to England to run again for a seat in Parliament, the seditious libel charge still hanging over his head for his criticism of the monarchy, Wilkes had spent time in France with the French *philosophes*. After word arrived in the American colonies that Wilkes had been elected to Parliament by the County of Middlesex but had, instead, been arrested and confined to the King’s Bench prison, the Sons of Liberty had rallied to Wilkes’

¹⁶⁵ Committee of the Boston Sons of Liberty to John Wilkes, Oct. 5, 1768, *available at* wwwFOUNDERS.archives.gov.

¹⁶⁶ APTHEKER, *THE AMERICAN REVOLUTION*, *supra* note 152, at 67, 148-49.

defense, with Joseph Warren, John Adams and their fellow Sons of Liberty sending these words to Wilkes, addressed as “Illustrious Patriot,” on June 6th:

The friends of Liberty, Wilkes, Peace and good order to the number of Forty five, assembled at the Whig Tavern Boston New England, take this first opportunity to congratulate your Country, the British Colonies and yourself, on your happy return to the land alone worthy such an Inhabitant: worthy! as they have lately manifested an incontestible proof of virtue, in the honorable and most important trust reposed in you by the County of Middlesex.

May you convince Great Britain and Ireland in Europe, the British Colonies, Islands and Plantations in America, that you are *one* of those incorruptibly *honest men* reserved by heaven to bless, and perhaps save a tottering Empire. That Majesty can never be secure but in the Arms of a brave, a virtuous, and united people. That nothing but a common interest, and absolute confidence in an impartial and general protection, can combine so many Millions of Men, born to make laws for themselves; conscious and invincibly tenacious of their Rights.

That the British Constitution still exists is our Glory; feeble and infirm as it is, we cannot, we will not despair of it. To a Wilkes much is already due for his strenuous efforts to preserve it. Those generous and inflexible principles which have rendered you so greatly eminent, support our claim to your esteem and assistance. To vindicate Americans is—not to desert yourself.

Permit us therefore much respected Sir, to express our confidence in your approved abilities and steady Patriotism. Your Country, the British Empire, and unborn millions plead an exertion, at this alarming Crisis. Your perseverance in the *good old cause* may still prevent the great System from dashing to pieces. 'Tis from your endeavors we hope for a Royal “Pascite, ut ante, boves”¹⁶⁷ and from our attachment to “peace and good order” we wait for a constitutional redress: being determined that the King of Great Britain shall have Subjects but not Slaves in these remote parts of his Dominions.¹⁶⁸

The Corsican rebellion, along with other quests for liberty, whether religious or civil, were very much on the minds of American revolutionaries in the

¹⁶⁷ “‘Put your cows out to pasture as you did before’ (that is, before your farm was taken; Virgil, *Eclogues*, 1. 46).” Editorial note 2, Committee of the Boston Sons of Liberty to John Wilkes, June 6, 1768, *available at* wwwFOUNDERS.archives.gov.

¹⁶⁸ Committee of the Boston Sons of Liberty to John Wilkes, June 6, 1768, *available at* wwwFOUNDERS.archives.gov.

lead up to the Revolutionary War. As William Bradford, speaking of “the overthrow of Liberty in Sweden & Corsica,” wrote to James Madison on August 1, 1774:

I have hopes that the congress which it is expected will meet at this City next month will do something towards effectually warding off[f] the attacks of Slavery and fixing the boundaries of our Liberties. Till that is done I am apprehensive all our endeavours will [be] of but little use, as they will not reach the root of the disorder: they may procure a repeal of the present acts, but that like the repeal of the stamp-act will be but a temporary relief & leave us exposed to the attacks of some future ministerial scoundrel who like North may be ambitious of “laying us at his feet.” It is recommended to our delegates to insist on the repeal of certain acts we deem oppressive & the confirmation (or if they please the *grant*) of certain rights, that are necessary to our Liberty. If this measure should be adopted by the Congress & this “bill of rights”¹⁶⁹ be confirmed by his majesty, or the parliament, the Liberties of America will be as firmly fixed, & defined as those of England were at the revolution. We expect much from the delegates of Virginia & Boston; for several of those appointed for this province are known to be inimical to the Liberties of America. I mean Galloway the author of the detestable peice signed Americanus in the time of the Stamp Act; & one Humphries an obscure assemblyman who but the moment before he was appointed voted against the having a congress at all. I am informed the State of affairs is still worse in New York where nothing but Dissention prevails. I hope they will not communicate any of that spirit to the Congress.

Indeed my friend the world wears a strange aspect at the present day; to use Shakespear’s expression “the times seem to be out of joint.” Our being attacked on the one hand by the Indians, & on the others, our Liberties invaded by a corrupt, ambitious & determined ministry is bring[ing] things to a crisis in America & seems to fortell some great event. In Europe the states entertain a general suspicion of each other; they seem to be looking forward to some great revolution & stand, as it were with their hands on their swords ready to unsheath them at the earliest warning. The obstinate & bloody contention of the Turk & Russian, the

¹⁶⁹ An apparent reference to “An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown,” usually known as the English Bill of Rights of 1689, enacted by Parliament in December 1689 in the aftermath of the “Glorious Revolution” of 1688. BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 93-95, 106, 174.

overthrow of Liberty in Sweden & Corsica, the Death of Lewis and the Accession of a young ambitious monarch to the throne of France lead us to imagine there is something at hand that shall greatly augment the history of the world: Many of our good people & among the rest Mr Halsey have calculated the commencement of the Millenium in the present Century, & others with equal probability, the consumation of all things: and indeed when the plot thickens we are to expect the conclusion of the drama.¹⁷⁰

Indeed, shortly after the Continental Congress issued the Declaration of Independence, John Adams wrote a letter to his wife Abigail that contains glowing praise of Dr. Benjamin Rush—the well-educated and well-traveled Beccaria disciple—and a reference to Pasquale Paoli. As John Adams' letter of July 23, 1776 reads in part:

This Morning I inclosed a Letter from Dr. Rush to me, containing Directions for managing Patients under Inoculation for the small Pox. Rush has as much success as any without Exception.

. . . .

I dont know how I can better entertain you, than by giving you some Idea of the Character of this Dr. Rush.—He is a Native of this Place, a Gentleman of an ingenious Turn of Mind, and of elegant Accomplishments. He has travelled in England, where he was acquainted with Mrs. Maccaulay, with whom he corresponded while there, and since his Return. He wrote an elegant, flowing Letter to her, while he was in England, concerning a Plan of a Republic which she wrote and addressed to Pascal Paoli. He afterwards travelled in France, and contracted a Friendship there with M. Dubourg, with whom he has corresponded ever since. He has published several Things upon Philosophy, Medicine, and Politicks, in this City. He is a Lecturer in the Colledge here, in some Branch of Physick or surgery, and is a Member of the American Philosophical Society. He has been sometime a Member of the City Committee and was last Week appointed a Delegate in Congress for this Place, in the Room of one, who was left out. He married last Winter, a young Lady, daughter of Mr. Stockton of New Jersey, one of the Judges of the Supream Court of that Government, and lately appointed a delegate in this

¹⁷⁰ William Bradford to James Madison, Aug. 1, 1774, *available at* wwwFOUNDERS.archives.gov.

Congress. This Gentleman is said to be a staunch American, I suppose, truly.¹⁷¹

Pasquale Paoli—and his quest for liberty for the Corsican people—continued to be a subject of conversation, if not obsession, as time progressed. Although American patriot James Bowdoin got wind of a rumor that Paoli was commanding British soldiers, and thus referred to him in February 1777 as “the now *Infamous* General Paoli,”¹⁷² the rumor was unfounded.¹⁷³ In fact, Paoli, Pennsylvania—a town named after the famous Corsican general—was the site of a vicious attack on Continental forces by the British later that year. On the evening of September 20, 1777, in the year John Adams would report “had three gallows in it, meaning the three sevens,”¹⁷⁴ a much larger contingent of British soldiers ambushed a small regiment of American troops commanded by General Anthony Wayne. Near General Paoli Tavern, a popular watering hole named for Pasquale Paoli,¹⁷⁵ British soldiers—in what became known as the Paoli Massacre—overran sleeping American soldiers, killing dozens of men in the darkness. Fifty-three mangled corpses were found in the field, wet from heavy rains, the next day and interred in a mass grave. The massacre, carried out with bayonets and light horsemen’s swords and later described as “British barbarity”

¹⁷¹ John Adams to Abigail Adams, July 23, 1776, *available at* wwwFOUNDERS.archives.gov.

¹⁷² The Massachusetts Council to the American Commissioners, Feb. 27, 1777 (to Benjamin Franklin, Silas Deane and Arthur Lee from James Bowdoin), *available at* wwwFOUNDERS.archives.gov.

¹⁷³ SAMUEL MAUNDER & WILLIAM L. R. CATES, *THE BIOGRAPHICAL TREASURY; A DICTIONARY OF UNIVERSAL BIOGRAPHY* 771 (London: Longmans, Green, Reader, and Dyer, 14th ed. 1868).

¹⁷⁴ MASUR, *rites of execution*, *supra* note 94, at 175 n.14; Editorial note 2, Washington Papers, General Orders, Apr. 22, 1777, *available at* wwwFOUNDERS.archives.gov.

¹⁷⁵ Editorial note 1, Brigadier General Anthony Wayne to George Washington, Sept. 19, 1777, *available at* wwwFOUNDERS.archives.gov.

and “cold-blooded cruelty,” took place just nine days after the more famous Battle of Brandywine, in which Lafayette fought and hundreds of American and British forces were either killed or wounded.¹⁷⁶ Lafayette—a Beccaria reader and a death penalty opponent—would later draft the Declaration of the Rights of Man and Citizen. It would draw on his experience in America and on the Virginia Declaration of Rights and America’s Declaration of Independence.¹⁷⁷

The Corsican patriot General Paoli was a well-known figure among American revolutionaries, and after the Paoli Massacre Continental Army soldiers would go into action using the war cry “Remember Paoli.”¹⁷⁸ John Adams made reference to “the Corsicans and Pascal Paoli” in a preliminary Draft of Peace Negotiation Articles in 1781;¹⁷⁹ there is a reference to “Corsica,” “Paschal Paoli’s Brother” and “a Handful of Corsican’s” defending themselves in a 1777 letter to George Washington;¹⁸⁰ and in a 1785 letter from John Adams to Thomas Jefferson, written from London when Adams was the first U.S. Minister to the Court of St. James, Adams even referenced how General Paoli had enquired after

¹⁷⁶ PROCEEDINGS ON THE OCCASION OF THE DEDICATION OF THE MONUMENT ON THE ONE HUNDREDTH ANNIVERSARY OF THE PAOLI MASSACRE, IN CHESTER COUNTY, PA., SEPTEMBER 20, 1877, at 6, 26, 30, 37, 39-42 (West Chester, PA: F. S. Hickman: 1877).

¹⁷⁷ ROSEMARY H. T. O’KANE, PATHS TO DEMOCRACY: REVOLUTION AND TOTALITARIANISM 66 (London: Routledge); ELIZABETH PRICE FOLEY, LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN A NEW ERA OF PUBLIC MORALITY 225 n.39 (New Haven: Yale University Press, 2008).

¹⁷⁸ Henry W. Shoemaker, “This Morning’s Comment,” ALTOONA TRIBUNE (Altoona, PA), June 5, 1940, p. 4.

¹⁷⁹ Editorial note 4, Enclosure: Draft of Peace Negotiation Article, July 13, 1781 (“Indeed it is Surprizing that the Powers of Europe should have so many delicacies about acknowledging american Independence explicitly. Switzerland[,] Portugal, Holland, and even Oliver Cromwell and the long Parliament, I had almost said that the Corsicans and Pascal Paoli, Scarcly found so many delicacies.”), *available at* wwwFOUNDERS.archives.gov.

¹⁸⁰ Major General John Sullivan to George Washington, Nov. 25, 1777, *available at* wwwFOUNDERS.archives.gov.

Jefferson's Italian-American friend Philip Mazzei.¹⁸¹ "[T]he Corsican patriot, whose efforts for the freedom of his mountainous isle made him the hero of Napoleon Bonaparte," one source later reported of Paoli and how he inspired the Corsican-born man who, ironically, became the French emperor, "earned for the hard-bitten, would-be liberator the name of the 'Corsican Washington.'"¹⁸²

In London, General Paoli became a close friend of Dr. Samuel Johnson, the famed dictionary maker, and American patriots would reportedly "invariably toast the 'Corsican Washington,' as they called him."¹⁸³ "Eighteenth-century London," a biography of Samuel Johnson notes, "was the genuine city of the Enlightenment, the scene of ideas-in-action, pragmatic liberty and dashing, dazzling spirit."¹⁸⁴ General Paoli became the godfather of Maria Cosway's only

¹⁸¹ As that letter reads:

In answer to your enquiry in your letter of the 4th. inst. I can only say that I knew Mr. Matzei at Paris and that he made long journeys. But in what stile he lived and at what expence he travelled I know not. He always made a genteel appearance without any unnecessary show, and kept good Company wherever he went. I observed this in Paris and heard of it in Holland. In Italy it could not be otherwise, for he is well known and esteemed there as I have always heard and particularly within these few days from the Genoese Ambassador and General Paoli; both of whom enquired of me, very respectfully, after Mr. Mazzei, at the Drawing Room, of their own motion. Knowing as you and I do how little way a thousand pounds go, in expences of living, if I were to guess at his expences, altho' he had not a house and train of Servants to maintain, nor a table that I know of, yet, considering the indispensable article of Cloaths, Carriage, Postage and Stationary, as well as the ordinary expences of Apartments, travelling and all the rest, I could not undertake to pay his way for a less Sum.

John Adams to Thomas Jefferson, Sept. 11, 1785, *available at* [www.founders.archives.gov](http://wwwFOUNDERS.archives.gov).

¹⁸² Henry W. Shoemaker, "This Morning's Comment," ALTOONA TRIBUNE (Altoona, PA), June 5, 1940, p. 4.

¹⁸³ Henry W. Shoemaker, "This Morning's Comment," ALTOONA TRIBUNE (Altoona, PA), May 4, 1949, p. 4.

¹⁸⁴ PETER MARTIN, SAMUEL JOHNSON: A BIOGRAPHY 146 (London: Weidenfeld & Nicolson, 2008).

child,¹⁸⁵ and Jefferson—who had spent a lot of time in Paris with Cosway and the American painter John Trumbull—was kept apprised of events pertaining to Corisca and Paoli by William Short and others.¹⁸⁶ Jefferson’s private secretary in Paris, William Short had traveled through Italian cities and towns after Jefferson himself had made a trip to Italy in 1787.¹⁸⁷

And Pasquale Paoli’s name appears in a 1790 letter from Catharine Macaulay Graham to George Washington on the subjects of “a free government,” “Democratical Government,” and avoiding “corruption.”¹⁸⁸ South Carolina

¹⁸⁵ Editorial note to Thomas Jefferson to Maria Cosway, June 23, 1790, available at wwwFOUNDERS.archives.gov; see also Francis Beretti, ed., *Pascal Paoli à Maria Cosway: Lettres et documents, 1782–1803* [Oxford, 2003].

¹⁸⁶ William Short to Thomas Jefferson, Nov. 30, 1789 (“The principles of unbounded liberty still reign in the assembly. They decided yesterday that in future Corsica should be considered as a part of France, enjoying equal privileges &c. &c. The exiles and particularly Paoli are allowed to return. Nothing has yet been done with respect to their islands.”), available at wwwFOUNDERS.archives.gov; Michael Morphy to Thomas Jefferson, July 30, 1793 (“Hood, who passed Barcelona on the 18th while heading eastward, is expected to sail to Corsica in order to aid General Paoli, who has arrived there with a British commission and is now at the head of thousands of Corsicans in the back and mountain settlements waiting for the arrival of British naval forces to begin hostilities with the French army there.”), available at wwwFOUNDERS.archives.gov; see also Arnold Oelrichs to Thomas Jefferson, Sept. 14, 1801 (reporting that Giuseppe Ceracchi, an Italian artist who did busts of George Washington and General Pasquale Paoli, among others, was “in the late plot against Bonaparte” and “was soon after taken into Custody & suffered Death”), available at wwwFOUNDERS.archives.gov; Enclosure: Francis Adrian Van der Kemp’s Synopsis of a Proposed Book [ca. Feb. 18, 1812) (referencing the “Corsica Struggle-conquest” in a section of a book outline pertaining to “Revolutions” along with “Geneve,” “Venice,” “Genoa—Tuscanÿ—Lucca—LombardÿSicilys,” “Swisserland Dissentions,” “Sweden Dissentions,” and others before the book outline moves to “Revolutionary Spirit in America”).

¹⁸⁷ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 113-15.

¹⁸⁸ Catharine Sawbridge Macaulay Graham to George Washington, June 1790. As she wrote from England in June 1790:

The sentiments yr Excellency expressed in yr Letter of the 9th of January are worthy of yr exalted character; and must be pleasing to all those who are friends to the happiness of man kind, For when by the success of yr arms, you afforded America the option of a free government; yr task was not so difficult, or more important, than yr present station; as her first Chief Majestrate.

lawyer and politician Charles Pinckney—a signer of the Declaration of Independence—also bought up Paoli’s name in a 1792 letter in trying to delineate “*treasons*” that “are acknowledged generally to be crimes” and “such as are only rendered so by tyrannical Laws.”¹⁸⁹ And Paoli’s name appears in yet another letter, one from John Adams to Thomas Jefferson, in which Adams, in 1814, expresses his belief that “the vast Variety of experiments that have been made of

The present system of American Government, contains all those principles which have been regarded as capable of resisting every hostile influence arising either from force or seduction. I once thought that such a system of government would be invulnerable; as yr Excellency must have perceived if you have ever read a political tract of mine adressed to Paoli the Corsican General. It is true that in that sketch of a Democratical Government, I endeavored to keep out corruption by enforcing a general Rotation; but I must acknowledge to you that the corruptions which have crept into our Legislature since the revolution, with the wise caution used by the french patriots in the rules to which they have subjected their National Assembly, have led me to alter my opinion; and this alteration of opinion, incline<s> me to fear, that ill consequences may arise from vesting the Legislative body with the power of establishing Offices, of regulating the quantum of their salaries, and of enjoying themselves the emoluments arising from such establishments. I should have thought it safer to have made them incapable of holding at least any Civil Office whilst they were Members of the Legislature. Th<ose> who have studied mankind with the greatest attention, find, that there is no depending on their virtue; except where all corrupting motives are put out of their way.

Id.

¹⁸⁹ Charles Pinckney to George Washington, Jan. 8, 1792, *available at* wwwFOUNDERS.archives.gov. As Charles Pinckney (1757-1824) wrote from Charleston, South Carolina:

I will acknowledge, that in *treasons*, or offences against the Government, as in the instances of Paoli & Calonne, there is a difficulty in drawing the line between such as are acknowledged generally to be crimes & such as are only rendered so by tyrannical Laws—but with respect to what the Law *denominates felonies*, the difficulty in a great measure ceases, for however they may vary in their modes of trial, the opinions of all civilised nations are generally the same with respect to the nature & extent of the Crimes of Murder, Piracy, Barratry, Forgery & others equally destructive to the order of Society—particularly Piracy, Barratry & Forgery, on the preventing of which by the strict & regular punishment of offenders must very much depend the intercourse necessary between trading Nations.

Id.

Constitutions,” in America, France, Holland, Switzerland, and in Spain and South America, “will be Studied” that that “[t]he result in time will be Improvements.” “And I have no doubt,” Adams wrote Jefferson in that letter, alluding to “revengefull bloody and cruel” despotism, “that the horrors We have experienced for the last forty Years, will ultimately terminate in the Advancement of civil and religious Liberty, and Ameliorations, in the condition of Mankind.”¹⁹⁰ In all, six U.S. towns—in Pennsylvania, Oklahoma, Colorado, Indiana, Kansas and Wisconsin—were named after Pasquale Paoli. Paoli, Pennsylvania—founded in the eighteenth century to honor Corsica’s famous general—was the inspiration for the towns in the West and Midwest.¹⁹¹

c. Italian Republics and the Italian Enlightenment

America’s Founding Fathers carefully studied the history of Italy, its ancient and modern rulers, and republics throughout the world, including on the Italian peninsula. In *A Defence of the Constitutions of Government of the United States*, a three-volume work, John Adams wrote of “[t]he checks and balances of republican government,” of “Greeks and Romans,” and “of governments of laws

¹⁹⁰ John Adams to Thomas Jefferson, July 16, 1814, *available at* wwwFOUNDERS.archives.gov.

¹⁹¹ STEPHANIE BERNARDO, *THE ETHNIC ALMANAC* 168 (Doubleday, 1981); GEORGE H. SHIRK, *OKLAHOMA PLACE NAMES* 183 (Norman, OK: University of Oklahoma Press, 2d ed. rev. and enlarged, 1974); MAXINE BENSON, *1001 COLORADO PLACE NAMES* 163 (Lawrence, Kansas: University Press of Kansas, 1994); EDWARD CALLARY, ED., *PLACE NAMES IN THE MIDWESTERN UNITED STATES* 57 (Lewiston, NY: Edwin Mellen Press, 2000); RONALD L. BAKER & MARVIN CARMONY, *INDIANA PLACE NAMES* 125 (Bloomington, IN: Indiana University Press, 1975); “Paoli’s Centennial,” *THE TIMES* (Philadelphia, PA), Sept. 21, 1877, p. 1; *compare* “The Indian Name of ‘Paola,’” *THE OSAGE FREE PRESS* (Osage City, KS), June 7, 1878, p. 3 (“The flourishing town in Kansas known as Paola was intended to perpetuate the name of a Corsican patriot, Gen. Pasquale Paoli. He was born in 1726, and died in London on 1807. He was a genuine patriot and philanthropist, and it is a pity the person who named the Kansas town did not know how to spell the name of his hero.”).

and not of men.” He meticulously studied—and broke out—“Democratical Republics,” “Aristocratical Republics,” “Monarchical Republics,” “Ancient Republics, and Opinions of Philosophers,” and “Mixed Governments.” Before moving on to “Locke, Milton, and Hume,” Adams discussed, among the governments of many other places, “[t]he republic of St. Marino, in Italy”; Genoa and Corsica; “[t]he republic of Venice”; Carthage and Rome.¹⁹² James Madison himself would stay apprised of events in Italy even long after he helped craft the U.S. Constitution. An 1805 letter from Thomas Appleton, sent from Leghorn aboard a vessel departing for the U.S., informed Madison of the goings on of “the Genoese,” a mode of government “adopted to obtain the votes of the people,” and lots of details about what was happening in Italy as regards governance issues.¹⁹³

The founders’ intense interest in Italian history, especially in the lead up to the 1787 Constitutional Convention in Philadelphia, is written all over the record. For example, in a May 1787 letter to Richard Cranch, Abigail Adams noted that her husband John was then “considering the I[t]alian Republicks through the middle age,” what she called “a work of no small labour” and an “expensive” project in terms of all the books involved in the endeavor.¹⁹⁴ John Adams developed such a close familiarity with Italian rulers and forms of government that Thomas Jefferson, in an 1819 letter to Adams, felt comfortable writing this: “Your intimacy with their history, antient, middle and modern, your familiarity

¹⁹² 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE, DATED THE TWENTY-SECOND DAY OF MARCH, 1778, at i-ii, xii, xxi, xxix-xxxii, 9, 57-58, 365 (Philadelphia: William Cobbett, 3d ed. 1797).

¹⁹³ To James Madison from Thomas Appleton (Abstract), 11 June 1805, *available at* www.founders.archives.gov.

¹⁹⁴ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 179.

with the improvements in the science of government at this time, will enable you, if any body, to go back with our principles and opinions to the times of Cicero, Cato, and Brutus, and tell us by what process these great and virtuous men could have led so unenlightened and vitiated a people into freedom and good government”¹⁹⁵

By railing against tyranny, *On Crimes and Punishments*—along with other Enlightenment texts such as Thomas Paine’s *Common Sense* and Montesquieu’s *Spirit of the Laws*—helped to spark the American Revolution itself.¹⁹⁶ The men who led the American Revolution were well read, they knew the story of the Glorious Revolution of 1688, and they understood all too well that power could corrupt. “[I]n the late eighteenth century,” constitutional scholar and Yale law professor Akhil Amar has aptly observed, “every schoolboy in America knew that the English Bill of Rights’ 1689 ban on excessive bail, excessive fines, and cruel and unusual punishments—a ban repeated virtually verbatim in the Eighth Amendment—arose as a response to the gross misbehavior of the infamous Judge Jeffreys.”¹⁹⁷ The notorious Lord Chief Justice George Jeffreys had presided over many death sentences as well as the case of convicted perjurer Titus Oates, sentenced in 1685 to be defrocked, fined, imprisoned for life, whipped, and pilloried four times a year for the rest of his life. The Magna Carta (1215) had a

¹⁹⁵ Thomas Jefferson to John Adams, Dec. 10, 1819, *reprinted in* JOYCE APPLEBY & TERENCE BALL, EDS., *JEFFERSON: POLITICAL WRITINGS* 225-26 (Cambridge: Cambridge University Press, 1999).

¹⁹⁶ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 47. Many early Americans read Montesquieu’s *Spirit of the Laws*. *E.g.*, W. Stull Holt, Charles Carroll, Barrister: The Man, 31 MARYLAND HISTORICAL MAGAZINE 112, 123 (1936).

¹⁹⁷ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 87 (New Haven: Yale University Press, 1998).

proportionality tradition in it, speaking of fines “in accordance with the degree of the offence,” but Beccaria’s treatise—advocating for the curtailment of judicial and executive discretion as regards punishment—was focused more on utilitarian outcomes instead of the *lex talionis* doctrine.¹⁹⁸

Runaway discretion in England’s common-law system had long been a bone of contention, of which the Titus Oates case was just but one example. Some in England labeled the punishment that Oates received “barbarous, inhuman, and unchristian”; “contrary to” the English Bill of Rights; “cruel and illegal”; and as “unusual” in that “an Englishman should be exposed upon a Pillory, so many times a Year, during his Life.”¹⁹⁹ In colonial Maryland, historian Jeffrey K. Sawyer points out, “a handsomely printed pamphlet from the Annapolis shop of William Parks” was released to the public in 1728 for two shillings. Titled “The *RIGHT* of the Inhabitants of *MARYLAND*,” the pamphlet—written by colonial lawyer Daniel Dulany—emphasized:

For as Laws are absolutely necessary, . . . it is certainly of the greatest Importance to know, whether a People are to be governed by *Laws*, which their *Mother-Country* has experimentally found, to be beneficial to Society, and adapted to the Genius, and Constitution of their Ancestors; . . . Or whether, They are to be governed by their Discretion, (as some People softly term the *Caprice*, and *Arbitrary Pleasure*,) of any Set of Men.²⁰⁰

On Crimes and Punishments appealed to its American readers as it sought to make laws certain but mild, equal not arbitrary, and written not unwritten. Even

¹⁹⁸ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 94-95; Robert J. McWhirter, *Baby, Don’t Be Cruel*, 46 ARIZ. ATT’Y 12, 18 (Dec. 2009); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L. Q. 833, 858-59 (2013).

¹⁹⁹ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 174-76.

²⁰⁰ Jeffrey K. Sawyer, *The Rhetoric and Reality of English Law in Colonial Maryland—Part II, 1689-1732*, 109 MARYLAND HISTORICAL MAGAZINE 81, 86, 89, 94 n.52 (2014).

though it was written by someone from a *civil law* tradition, it sought to eliminate the kind of unbridled judicial discretion, the kind of English *common law* excesses, that had been so roundly criticized in the case of Titus Oates.²⁰¹

Beccaria's treatise—as with Thomas Paine's later published bestseller, *Common Sense*—appeared at an especially critical time in U.S. history. In the 1760s, Americans, feeling oppressed by British rule and laws such as the Stamp Act of 1765, were—like their British ancestors—highly receptive to revolutionary ideas.²⁰² In 1763, Rousseau's *The Social Contract* first appeared, with Rousseau opening his book by writing “Man is born free, and everywhere he is in chains.”²⁰³ And it was Enlightenment writers, like Beccaria and Montesquieu, to whom the founders turned for intellectual firepower for the revolutionary impulses they felt. In 1748, Montesquieu's enormously popular *Spirit of the Laws* was published, with Montesquieu detailing countries' penal practices and advocating for separation of powers.²⁰⁴ James Madison, in *The Federalist Papers*, referred to “the celebrated Montesquieu” as “[t]he oracle who is always consulted and cited on this subject,” with Madison framing the U.S. Constitution and its Bill of Rights in ways that guaranteed checks on abuses of power.²⁰⁵ The three branches of government would check each other; the press, serving as the Fourth Estate, would check all three; and the right to trial by jury—and the guarantee of grand juries in cases of “capital” or “infamous” crimes—would

²⁰¹ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 174-76.

²⁰² *Id.* at 98.

²⁰³ DAVID LAY WILLIAMS, ROUSSEAU'S PLATONIC ENLIGHTENMENT 147 (University Park, PA: The Pennsylvania State University Press, 2007).

²⁰⁴ *Id.* at 36-37.

²⁰⁵ CHRISTOPHER N. PHILLIPS, EPIC IN AMERICAN CULTURE: SETTLEMENT TO RECONSTRUCTION 77 (Baltimore, MD: The Johns Hopkins University Press, 2012).

ensure that ordinary citizens would remain in control of important governmental functions dealing with criminal prosecutions.²⁰⁶

For America's founders, political leaders who believed, like Enlightenment writers such as Beccaria, Grotius and Vattel,²⁰⁷ in natural rights, Montesquieu, Rousseau and Beccaria—especially in combination with other writers being read—made an alluring, powerful appeal.²⁰⁸ Both George Mason's Virginia Declaration of Rights (1776) and Thomas Jefferson's Declaration of Independence (1776) would ultimately employ a natural law framework in setting out citizens' rights. The right to life and liberty—and later, in the Bill of Rights, the right to be free from double jeopardy and cruel and unusual punishments, and to have due process—would be placed front and center.²⁰⁹ The Declaration of Independence spoke of “the Laws of Nature and of Nature's God,” with the stirring language of that proclamation of equality and freedom famously reciting: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”²¹⁰

²⁰⁶ U.S. CONST., art. I, II & III; U.S. CONST., amends. I, V & VI.

²⁰⁷ LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 149 (Dordrecht: Martinus Nijhoff Publishers, 1992) (“In the natural law theory of Grotius, the individual human being is a focal point of all law, including the law of nations. Successors of Grotius, most notably Vattel, placed much greater emphasis on the State as holder of international legal rights and obligations while presuming the validity of natural law.”).

²⁰⁸ BESSLER, *CRUEL AND UNUSUAL*, *supra* note 66, at 32, 95.

²⁰⁹ U.S. CONST., amends. V & VIII; ROBERT P. DAVIDOW, *NATURAL RIGHTS AND NATURAL LAW: THE LEGACY OF GEORGE MASON* 247 (Fairfax, VA: George Mason University Press, 1986); BARRY ALAN SHAIN, ED., *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* 95, 127 (Charlottesville: University of Virginia Press, 2007).

²¹⁰ Declaration of Independence (July 4, 1776).

Jefferson's thoughts on life, liberty and the pursuit of happiness had been set in motion years earlier, thanks in part to Beccaria's *On Crimes and Punishments*. Indeed, in 1769, just two years after Beccaria's treatise was translated into English, the fourth volume of William Blackstone's *Commentaries on the Laws of England* hit the presses. In that book, Blackstone cited Beccaria's treatise and wrote that it is "absurd and impolitic to apply the same punishment to crimes of different magnitude."²¹¹ The much-revered Oxford icon of English law, Blackstone was much read in colonial and early America, with his *Commentaries* regularly read by American lawyers, including by President Abraham Lincoln, the sixteenth President of the United States.²¹² Blackstone's *Commentaries* announced that a punishment "ought always to be proportioned to the particular purpose it is meant to serve, and by no means exceed it." "A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them)," Blackstone wrote, "do likewise prove a manifest defect either in the wisdom of the legislature, or the strength of executive power."²¹³

d. Beccaria, Blackstone and Montesquieu

Although Blackstone still favored executions, he did so for only limited crimes and circumstances, recounting the "melancholy" truth that English law then made approximately 160 different crimes punishable by death.²¹⁴ "It is a kind of quackery in government, and argues a want of solid skill," the Beccaria-inspired Blackstone asserted, "to apply the same universal remedy, the *ultimum*

²¹¹ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 48-49.

²¹² BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 16, 223-24.

²¹³ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 49.

²¹⁴ *Id.*

supplicium, to every case of difficulty.” “It is, it must be owned,” Blackstone noted, “much *easier* to extirpate than to amend mankind: yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure.”²¹⁵ As early American lawmakers trimmed the number of capital crimes from the statute books, a process that would occur on a state-by-state basis, the treatises written by Montesquieu, Beccaria and Blackstone certainly had a hand in inspiring legislators to do so. The Enlightenment produced a wide array of writers from a diverse range of countries. But Beccaria’s *On Crimes and Punishments* made a bigger splash than many titles because of its accessible style.

The influence of Beccaria’s treatise on America’s founders is readily apparent from 1770s newspapers and various speeches and documents. In 1774, John Dickinson—a lawyer and politician from Philadelphia, and one of Pennsylvania’s delegates to the First Continental Congress—openly referred to “[t]he genius of a Beccaria” and “the masterly hand of a Beccaria.”²¹⁶ John Hancock—now most remembered for his flamboyant signature on the Declaration of Independence—owned “Beccaria on Crimes,” and the Continental Congress, of which Hancock once served as president, was familiar with and, as evidenced by its own work, evidently impressed by Beccaria’s treatise.²¹⁷ In October 1774, the First Continental Congress, meeting in Philadelphia, approved a Declaration of Rights based on “the immutable laws of nature, the principles of the English

²¹⁵ Id.

²¹⁶ Id. at 319.

²¹⁷ LORENZO SEARS, JOHN HANCOCK: THE PICTURESQUE PATRIOT 109, 228 (Boston: Little, Brown, & Co., 1913).

constitution, and the several charters or compacts” of the colonies.²¹⁸ That same month, the Continental Congress—as part of a propaganda campaign aimed at gaining the support of the colonists’ northern neighbors for the American cause—issued its now little-remembered letter to the inhabitants of Quebec, quoting both Montesquieu and Beccaria.²¹⁹

In 1774, that pivotal year in the history of the American Revolution, for the Revolutionary War had yet to begin and it was then still possible for that war to have been averted, Montesquieu and Beccaria’s guiding hand is plainly felt. Indeed, it was on October 26, 1774, just months before the start of the Revolutionary War (1775-1783), that the Continental Congress sent its telling open letter “To the Inhabitants of the Province of Quebec.” Addressed to “Friends and Fellow-Subjects,” that letter—which put Beccaria front and center—complained of the audacious and cruel abuse of English subjects and of the withholding of “irrevocable rights” by royal ministers. “The *legislative, executive* and *judging* powers are all moved by the nods of a Minister,” the letter lamented, calling the Governor of Quebec “*dependant* on the servant of the Crown in Great-Britain.” “Privileges and immunities,” the letter asserted, “last no longer than his smiles.” As the Continental Congress’ letter, reprinted in the *Pennsylvania Gazette* and elsewhere, read: “‘In every human society,’ says the celebrated Marquis *Beccaria*, ‘there is an *effort continually tending* to confer on one part the

²¹⁸ BRIAN STEELE, *THOMAS JEFFERSON AND AMERICAN NATIONHOOD* 40 n.136 (Cambridge: Cambridge University Press, 2012).

²¹⁹ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 66, 147; *see also* LITTELL’S *LIVING AGE*, Vol. CLXXXIX, p. 709 (Boston: Littell and Co., 1891) (noting that “[d]uring the War of Independence impassioned appeals were made to the French of Canada to join the thirteen colonies against England” and “references were made to the writings of Beccaria and to the spirit of the ‘immortal Montesquieu’”).

height of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to *oppose this effort*, and to diffuse their influence *universally* and *equally*.”

Beccaria’s words thus played a crucial role in the impassioned argument of the Continental Congress, especially in terms of how British oppression was characterized. As the October 1774 letter of Congress continued, returning to Beccaria’s themes: “Rulers, stimulated by their pernicious ‘effort,’ and subjects, animated by the just ‘intent of opposing good laws against it,’ have occasioned that vast variety of events, that fill the histories of so many nations. All these histories demonstrate the truth of this simple position, that to live by the will of one man, or sett of men, is the production of misery to all men.” “On the solid foundation of this principle, Englishmen reared up the fabric of their constitution with such a strength, as for ages to defy time, tyranny, treachery, internal and foreign wars,” Congress’ letter read. “And, as an illustrious author of your nation, hereafter mentioned, observes,” Congress’ letter added, then quoting the Frenchman Montesquieu, whose book, *The Spirit of the Laws* (1748) had so impressed the founders, ““They gave the people of their Colonies the form of their own government, and this government carrying prosperity along with it, they have grown great nations in the forests they were sent to inhabit.””²²⁰

After quoting Beccaria and Montesquieu, the open letter “To the Inhabitants of Quebec”—approved by the strong-willed American colonists then assembled at “a General Congress at Philadelphia”—recited what Americans saw

²²⁰ “To the Inhabitants of the Province of Quebec,” THE PENNSYLVANIA GAZETTE (Philadelphia, PA), Nov. 9, 1774, pp. 5-6.

as their fundamental rights. The “first grand right,” the letter insisted, is “that of the people having a share in their own government, by the representatives, chosen by themselves, and in consequence of being ruled by *laws* which they themselves approve, not by *edicts* of *men* over whom they have no controul.” “This,” the letter said, “is a bulwark surrounding and defending their property, which by their honest cares and labours they have acquired, so that no portions of it can legally be taken from them, but with their own full and free consent, when they in their judgment deem it just and necessary to give them for public services, and precisely direct the easiest, cheapest, and most equal methods, in which they shall be collected.” “If money is wanted by Rulers who have in any manner oppressed the people, they may retain it, until their grievances are redressed,” the letter emphasized, airing the colonists’ full-throated concerns about taxation without representation.

The 1774 letter also described “[t]he next great right” as “that of trial by jury”—a right supported by Beccaria—so that “neither life, liberty nor property can be taken from the possessor, until twelve of his unexceptionable countrymen and peers, of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry face to face, in open Court, before as many of the people as choose to attend, shall pass their sentence upon oath against him.” The letter also recited the rights “to the liberty of the person”; to obtain a writ of habeas corpus from a judge if illegally “seized and imprisoned”; and “the freedom of the press” to facilitate “the advancement of truth, science, morality, and arts”

and the “ready communication of thoughts between subjects . . . whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.” “These are the invaluable rights, that form a considerable part of our mild system of government,” the 1774 letter of the Continental Congress concluded. The right to habeas corpus would later be included in the U.S. Constitution and the right to freedom of the press would make its way into the First Amendment.²²¹

Tracking the quote from Beccaria’s treatise, the 1774 letter to the inhabitants of Quebec spoke of those “invaluable rights” and that “mild system of government” as “sending its equitable energy through all ranks and classes of men,” thus defending “the poor from the rich, the weak from the powerful, the industrious from the rapacious, the peaceable from the violent, the tenants from the lords, and all from their superiors.” This rhetoric closely tracks Beccaria’s, showing the power of his appeal to the men who would soon break away from England and forge their own country. “These are the rights,” the Continental Congress contended, “without which a people cannot be free and happy, and under the protecting and encouraging influence of which, these Colonies have hitherto so amazingly flourished and increased.” “These are rights,” the letter proclaimed, attacking George III’s administration, “a profligate Ministry are now striving, by force of arms, to ravish from us, and which we are, with one mind, resolved never to resign but with our lives.” “These are the rights *you* are entitled

²²¹ Id.; U.S. CONST., art. 1, sec. 9 & amend. I. Cesare Beccaria, who supported *certain* punishments rather than *severe* ones, also supported the right to trial by jury in *On Crimes and Punishments*. BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 36.

to, and ought at this moment in perfection to exercise,” the Americans communicated to their French-speaking counterparts, the people of Quebec.²²²

After taking note of “the late Act of Parliament” and issues facing the people of Quebec, the 1774 letter of the Continental Congress queried, “What would your countryman, the immortal *Montesquieu*, have said to such a plan of domination, as has been framed for you?” The Quebec Act of 1774, enacted as “An Act for making more effectual Provision for the Government of the Province of Quebec in North America,” was passed by the British Parliament to regulate the governance of that province. The Continental Congress’ advice to its northern neighbors: “Hear his words, with an intenseness of thought suited to the importance of the subject.” As Montesquieu—that Madisonian oracle of separation of powers—was quoted by the Continental Congress: ““In a free state, every man, who is supposed a free agent, *ought to be concerned in his own government*: Therefore the *legislative* should reside in the whole body of the *people*, or their *representatives*.”” ““The political liberty of the subject is a *tranquility of mind*, arising from the opinion each person has of his *safety*. In order to have this liberty, it is requisite the government be so constituted, as that one man need not be *afraid* of another.”” ““When the power of *making* laws, and the power of *executing* them, are *united* in the same person, or in the same body of Magistrates, *there can be no liberty*; because apprehensions may arise, lest the same *Monarch* or *Senate* should *enact* tyrannical laws, to *execute* them in a tyrannical manner.”” In short, American colonists were asking their northern

²²² “To the Inhabitants of the Province of Quebec,” THE PENNSYLVANIA GAZETTE (Philadelphia, PA), Nov. 9, 1774, pp. 5-6.

neighbors to no longer tolerate the power-thirsty and unresponsive British monarchy.²²³

Asking the people of Quebec to consider what advice the “truly great” Montesquieu would give, and citing “[t]he injuries of Boston have roused”²²⁴ from “Nova-Scotia to Georgia,” the Continental Congress invited the people in what is now Canada²²⁵ “to meet together in your several towns and districts, and elect Deputies, who afterwards meeting in a provincial Congress, may chuse Delegates, to represent your province in the continental Congress to be held at Philadelphia on the tenth day of May, 1775.” “In the present Congress,” the October 1774 letter of the Continental Congress read, it had been resolved “That we should consider the violation of your rights, by the act for altering the government of your province, as a violation of our own, and that you should be invited to accede to our confederation, which has no other objects than the perfect security of the natural and civil rights of all the constituent members, according to their respective circumstances, and the preservation of a happy and lasting

²²³ Id. The Continental Congress also quoted these maxims of Montesquieu: “‘The power of *judging* should be exercised by persons taken from the *body of the people*, at certain times of the year, and pursuant to a form and manner prescribed by law. *There is no liberty*, if the power of *judging* be not *separated* from the *legislative* and *executive* powers.’” “‘Military men belong to a profession, which *may be* useful, but *is often* dangerous.’” “‘The enjoyment of liberty, and even its support and preservation, consists in every man’s being allowed to speak his thoughts, and lay open his sentiments.’” Id.

²²⁴ The Boston Tea Party took place in December 1773. Angered by the British Parliament’s attempt to give a monopoly on the import of tea into America to the East India Company, colonists boarded ships in the harbor and threw more than 300 chests of tea overboard. 1 STEVEN L. DANVER, REVOLTS, PROTESTS, DEMONSTRATIONS, AND REBELLIONS IN AMERICAN HISTORY: AN ENCYCLOPEDIA 204-5 (Santa Barbara, CA: ABC-CLIO, 2011).

²²⁵ The confederation of Canada, now more than 150 years old, did not occur until 1867. 30 THE CANADIAN TIMES 828 (Canada: The Carswell Co., 1911)

connection with Great-Britain, on the salutary and constitutional principles herein before mentioned.”²²⁶

e. The Pursuit of Happiness and a New Punishment Paradigm

For some Americans, the abolition of capital punishment—one of the most talked about focuses of *On Crimes and Punishments*—became a moral imperative, with Beccaria’s treatise providing the intellectual rationale for abolition. “The marquis of Beccaria,” Dr. Benjamin Rush wrote in *The American Museum* in 1789, “has established a connexion between the abolition of capital punishments and the order and happiness of society.”²²⁷ In March of 1787, just a few months before delegates assembled in Philadelphia for the Constitutional Convention that would produce the U.S. Constitution, Dr. Rush specifically invoked Beccaria’s name at the house of America’s elder statesman Benjamin Franklin. In his talk, Dr. Rush called death “an improper punishment for any crime.”²²⁸ Beccaria, like Montesquieu, believed that any punishment that goes

²²⁶ “To the Inhabitants of the Province of Quebec,” THE PENNSYLVANIA GAZETTE (Philadelphia, PA), Nov. 9, 1774, pp. 5-6. The October 26, 1774 letter of the Continental Congress, signed by its president Henry Middleton, concluded: “That Almighty God may incline your minds to approve our equitable and necessary measures, to add yourselves to us, to put your fate, whenever you suffer injuries which you are determined to oppose, not on the small influence of your single province, but on the consolidated powers of North-America, and may grant to our joint exertions an event as happy as our cause is just, is the fervent prayer of us, your sincere and affectionate friends and fellow-subjects.” Id.

²²⁷ DAGOBERT D. RUNES, ED., THE SELECTED WRITINGS OF BENJAMIN RUSH 46 (New York: The Philosophical Library 1947)

²²⁸ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 53; *see also* “America,” THE PENNSYLVANIA PACKET (Philadelphia, PA), May 12, 1787, p. 2 (reprinting extract from Dr. Rush’s “Inquiry into the Effects of public Punishments upon Criminals, and upon Society” that was presented “at the House of his Excellency Benjamin Franklin, Esq. in Philadelphia, March 9, 1787”).

beyond what is “absolutely necessary” is “tyrannical,”²²⁹ with early Americans—as part of the American Revolution—embracing that general principle.²³⁰ The rub came with actually deciding *what* punishments were then still necessary. As one North Carolina newspaper wrote in 1846, describing the field on which the debate was waged: “Every drop of blood which is shed as a penalty for crime when *no necessity* existed for it, is *wrongfully shed*: every life which is taken under such

²²⁹ “Communication,” RALEIGH REGISTER AND NORTH CAROLINA GAZETTE (Raleigh, NC), June 5, 1846, p. 2 (“The right of Government to punish offences arises from *necessity*. It is based on the principle of self-preservation, which is applicable to Governments as well as individuals. ‘Every punishment,’ says Baron Montesquieu, ‘which does not arise from *absolute necessity*, is *tyrannical*’—and *Beccaria*, in his admirable work on crimes, remarks ‘All punishment which oversteps *necessity* become *tyranny*.’”); id. (“When one enters the social compact he is presumed to consent to a surrender of so much of his personal or natural liberty as may be necessary for the protection or safety of the whole. It is under this that Government derives the power to deprive one of life—limb—or member—or to inflict upon him any bodily pain whatever. When the necessity for such punishment ceases, then the right to inflict it likewise ends. If a milder penalty will accomplish the purpose, and afford ample protection to Society, then Government is bound to dispense with the harsher, or it becomes tyrannical. We are told ‘that whoso shedeth man’s blood, by man *shall* his blood be shed,’ but when there is no absolute *necessity* for it, what right has Government to take life for any other offence?”).

²³⁰ “To the Editor of the Evening Post,” THE EVENING POST (New York, NY), Aug. 3, 1802, p. 2 (“[B]ut, says the great Montesquieu, ‘every penal regulation which does not arise from absolute necessity, is tyrannical’. The question now recurs, Does this law arise from absolute necessity? Are there no other means less oppressive by which the contemplated benefit may be effected?”); “The Death Penalty—Let us Rid Ourselves of this Relic of Barbarism,” THE BROOKLYN DAILY EAGLE (Brooklyn, NY), Aug. 29, 1867, p. 2 (“‘Every punishment which does not arise from absolute necessity,’ says the great Montesquieu, ‘is tyran[n]ical, or every act of authority of one man over another, or of a nation over a man, for which there is not an absolute necessity is tyrannical;’ and if it is not a necessity to hang for any crime, and we believe it is not, the death penalty, therefore, is a war of a whole nation against one man It was said by Marquis Boccarin [sic], over one hundred years ago, ‘that the punishment of death was pernicious to society, from the example of barbarity it affords,’ ‘and that it is absurd that the laws which detest and punish homicide should, in order to prevent murder, publicly commit murder themselves.’”); compare Charles E. Rice, *A Cultural Tour of the Legal Landscape: Reflections on Cardinal George’s Law and Culture*, 1 AVE MARIA L. REV. 81, 85 (2003) (“The Catholic Church teaches . . . that the use of the death penalty may not be justified for purposes of retribution, general deterrence, or generalized protection of society. Instead, the state may exercise capital punishment only where it is absolutely necessary to protect other lives from *that* criminal.”).

circumstances, amounts to nothing less than murder—cold blooded and tyrannical murder in the Government itself!”²³¹

In a grand jury charge before the ratification of the U.S. Bill of Rights, the Hon. James Duane—a New York district court judge—paraphrased more than one passage from Beccaria’s treatise. “Severe laws may be necessary to support despotic power,” Judge Duane instructed jurors, “and it is the interest of tyrants to inspire their vassals with fear and servility; but a free republic calls for moderation.” Having echoed Beccaria’s themes against tyranny and in favor of milder penalties, Judge Duane continued: “The celebrated Beccaria observes, that the countries and times most notorious for severity of punishment were always those in which the most inhuman and atrocious crimes were committed.”²³² In other words, tyrannical monarchs, like the British monarchy, used draconian edicts to enforce their will, but republics, including the United States of America, should—by their nature—employ milder laws.

Not only did several of the Founding Fathers, including Benjamin Franklin, Thomas Jefferson, James Madison, John Adams and John Quincy Adams, study and speak Italian,²³³ but those men were enamored of the history of Greece and Italy and the Greek, Italian and Roman republics.²³⁴ “Caesar, by

²³¹ “Communication,” RALEIGH REGISTER AND NORTH CAROLINA GAZETTE (Raleigh, NC), June 5, 1846, p. 2

²³² “For the Times,” THE TIMES (London, England), Nov. 3, 1790, p. 4. The U.S. Bill of Rights was ratified on December 15, 1791. TERENCE BALL, ED., HAMILTON, MADISON, AND JAY: THE FEDERALIST WITH LETTERS OF “BRUTUS” xxxvi (Cambridge: Cambridge University Press, 2003).

²³³ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 17, 107-8, 116, 118, 120, 124, 134-36, 175-79, 502.

²³⁴ *E.g.*, JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE,

destroying the Roman Republic, made himself perpetual Dictator,” John Adams wrote in June 1771; in May 1777—to give another representative example—Adams wrote to Continental Army Major-General Nathanael Greene from Philadelphia to describe “the civil Wars in Rome, in the Time of Sylla.” In the latter instance, Adams paraphrased phrases from Abbé René Aubert de Vertot’s *The History of the Revolutions that Happened in the Government of the Roman Republic*. James Madison recommended that very book for the Library of Congress along with books on the history of the Venetian republic and the Republic of Geneva as well as Edward Wortley Montagu’s *Reflections on the Rise and Fall of the Antient Republicks*. Madison’s recommendations also included “Beccaria’s works” as well as an assortment of books on both the civil law and the common law.²³⁵

The Declaration of Independence—though influenced by many sources—itsself carries echoes of Beccaria’s philosophy, famously reading: “We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”²³⁶ Early Americans were not very familiar with the writings of Cesare Beccaria’s Italian mentor, Pietro Verri.²³⁷ But Verri’s 1763

DATED THE TWENTY-SECOND DAY OF MARCH, 1778 (Philadelphia: William Cobbett, 3d ed. 1797).

²³⁵ John Adams Papers, June 1771 (entry for June 13, 1771) & John Adams to Nathanael Greene, May 24, 1777, *available at* wwwFOUNDERS.archives.gov; James Madison Papers, Report on Books for Congress, Jan. 23, 1783, *available at* wwwFOUNDERS.archives.gov.

²³⁶ Declaration of Independence (July 4, 1776).

²³⁷ Pietro Verri’s name is largely absent from early American newspapers. A search for his name on the database newspapers.com reveals that the first references to his name appear in September 1899 in various Kansas newspapers. Those newspapers take note of a letter that Pietro Verri wrote in 1780 on the subject of “English calmness.” “An Italian

book, *Meditazioni sulla felicità* (*Meditations on Happiness*), was—in the words of one source—“immediately considered a manifesto of the Milanese Enlightenment.” Pietro Verri’s treatise, that source reports, “follows the lines of Locke, Helvétius, and especially Rousseau.”²³⁸ Verri’s book—as another source puts it—argued that “it was man’s inbuilt dissatisfaction with things as they are that led to progress, a fundamental idea, grounded in empiricist thinking, which he elaborated on later in his *Discorso sull’indole del piacere e del dolore* (*Discourse on the Nature of Pleasure and Pain*, 1773).”²³⁹ Because Verri personally influenced Beccaria, his own ideas can’t be dismissed or ignored. Indeed, Verri’s ideas—albeit indirectly—influenced Americans to the extent that they shaped the views expressed by Beccaria in *On Crimes and Punishments*.

Both Verri’s book and Beccaria’s treatise are considered “masterpieces of the Italian Enlightenment,” with those texts described in one encyclopedia as follows: “Pietro Verri’s *Meditazioni sulla felicità* (ca. 1763; *Meditations on Happiness*) was an elaboration of an ethical system intended to be both secular and utilitarian.” “Beccaria’s *Dei delitti e delle pene* (1764; *An Essay on Crimes and Punishments*) challenged the European conscience to consider the question of justice and made the ‘school of Milan’ one of the true centers for cosmopolitan

on the English,” THE OSAGE COUNTY CHRONICLE (Burlingame, KS), Sept. 20, 1899, p. 3; “An Italian on the English,” THE ADVOCATE (Lakin, KS), Sept. 21, 1899, p. 7; “An Italian on the English,” THE HOISINGTON DISPATCH (Hoisington, KS), Sept. 21, 1899, p. 7; “An Italian on the English,” GARNETT JOURNAL (Garnett, KS), Sept. 22, 1899, p. 7; “An Italian on the English,” THE VALLEY FALLS NEW ERA (Valley Falls, KS), Sept. 23, 1899, p. 7.

²³⁸ GAETANA MARRONE, ED., *ENCYCLOPEDIA OF ITALIAN LITERARY STUDIES* 1980 (New York: Routledge, 2007).

²³⁹ ANN HALLAMORE CAESAR & MICHAEL CAESAR, *MODERN ITALIAN LITERATURE* 38 (Cambridge: Polity Press, 2007).

dialogue.”²⁴⁰ As scholar Bernard Harcourt, of Columbia Law School, writes, “Beccaria drew heavily on the work of his compatriot and close colleague Pietro Verri, who articulated in his *Meditazioni sulla felicità* (Meditations on happiness), published a year earlier in 1763, the keystone to their new philosophical approach: happiness.” “The end of the social pact,” Verri explained in 1763, “is the well-being of each of the individuals who join together to form society, who do so in order that this well-being becomes absorbed into the public happiness or rather the greatest possible happiness distributed with the greatest equality possible.” Taking an egalitarian and utilitarian tact, Beccaria—foreshadowing Jefferson’s Declaration of Independence—himself wrote in his treatise of “the greatest happiness shared among the greater number.”²⁴¹

Thomas Jefferson, the principal drafter of the Declaration of Independence, had long before acquainted himself with *On Crimes and Punishments*, a book that Jefferson would recommend to other aspiring lawyers during his lifetime. For example, in advising his younger cousin, John Garland Jefferson, Jefferson suggested that he read works by Montesquieu and Beccaria,

²⁴⁰ MICHEL DELON, ED., *ENCYCLOPEDIA OF THE ENLIGHTENMENT* 724 (New York: Routledge, 2001). American colonists were certainly not oblivious to events in Milan and other parts of Europe. Newspapers, in fact, regularly reported on events in European cities, including the goings on in places such as Milan. *THE VIRGINIA GAZETTE* (Williamsburg, VA), Aug. 1, 1766, p. 1 (“MILAN, *April* 12. It is at length determined that the Court de Firmian, Minister Plenipotentiary from Austrian Lombardy, shall make his publick entry into this city the 25th instant . . .”).

²⁴¹ BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 59 (Cambridge: Harvard University Press, 2011); compare JAVIER MOSCOSO, *PAIN: A CULTURAL HISTORY* 60 (New York: Palgrave Macmillan, 2012) (“A year before the publication of *On Crimes and Punishments*—the text that made him truly famous—Beccaria’s cousin, Pietro Verri, had published his *Meditations on Happiness* in which this promoter of the Italian Enlightenment circle known as the *Society of the Fist* maintained that the search for well-being depended on a rational fight against the impediments to pleasure.”); id. (“The second of the Verri brothers . . . had also published a brief text denouncing the use of pain . . .”).

among others. Likewise, in an 1807 letter to John Norvell, later a U.S. Senator from Michigan, Jefferson—the ardent republican with a fascination for Italian culture—recommended “Beccaria on crimes & punishments, because of the demonstrative manner in which he has treated that branch of the subject.”²⁴² Before he drafted the Declaration of Independence (1776), Thomas Jefferson had read Beccaria and a host of other Enlightenment writers, including John Locke, Francis Hutcheson, David Hume, William Blackstone, Thomas Hobbes and Jean-Jacques Burlamaqui.²⁴³ John Locke had used the exact phrase “pursuit of happiness” in *An Essay concerning Human Understanding* (1689), and had written, in particular, “Of Modes of Pleasure and Pain.”²⁴⁴ Jefferson and other penal reformers were fascinated by these ideas, and Beccaria’s treatise—whether read in Italian, French or English—was part of the mix.²⁴⁵ “The art of life is the art of avoiding pain, and he is the best pilot who steers clearest of the rocks and shoals with which it is beset,” Jefferson once wrote.²⁴⁶

²⁴² BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 54-55.

²⁴³ ALLEN JAYNE, JEFFERSON’S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY, AND THEOLOGY 128-29 (Lexington, KY: The University Press of Kentucky, 1998).

²⁴⁴ *Id.* at 129. “That we call *Good*,” Locke wrote, is that “which is apt to cause or increase Pleasure, or diminish Pain in us. And on the contrary, we name that *Evil*, which is apt to produce or increase any Pain, or diminish any Pleasure in us.” *Id.* Locke believed that “all Men desire Happiness,” and that it was the “great end” of human beings, making men devoted to the “pursuit of happiness.” *Id.* at 129-30.

²⁴⁵ Stephen D. Soble, *A Regime of Social Death: Criminal Punishment in the Age of Prisons*, 21 N.Y.U. REV. L. & SOC. CHANGE 497, 524 (1995) (“Inspired by European writers such as Cesare Beccaria, American reformers condemned the bodily punishments of the colonial period as inhumane and self-defeating. In Beccaria’s words, ‘the severity of punishment of itself emboldens men to commit the very wrongs it is supposed to prevent,’ because they ‘are driven to commit additional crimes’ in order to avoid detection.”).

²⁴⁶ KEVIN J. HAYES, THE ROAD TO MONTICELLO: THE LIFE AND MIND OF THOMAS JEFFERSON 338 (Oxford: Oxford University Press, 2008).

f. Dragonetti, Filangieri and Gorani

The Italian Enlightenment became known for its philosophers—and for its focus on efforts to maximize people’s happiness.²⁴⁷ For example, Thomas Paine—the author of *Common Sense*—quoted Giacinto Dragonetti’s *Treatise on Virtues and Rewards* (1766) for this proposition: “The science of the politician consists in fixing the true point of happiness and freedom. Those men would deserve the gratitude of ages, who should discover a mode of government that contained the greatest sum of individual happiness, with the least national expense.”²⁴⁸ Giacinto Dragonetti (1738-1818), a young lawyer from Aquila, Italy, whose Italian treatise, *Delle virtue de’ Premi*, was first published in Naples in 1766 before being translated into English, would see his treatise appear in a bilingual Italian-English edition in 1769. Called “Beccaria’s disciple” by one historian, the pro-republican Dragonetti—who asserted “[w]e have made numberless laws to punish crimes, and not one is established to reward virtue”—had learned about Beccaria’s book by 1765. In *Common Sense*, Thomas Paine—called the “Father of the American Revolution” for his passionate call in January 1776 for American independence—described Dragonetti, a disciple of Antonio

²⁴⁷ Patrick J. Charles, *Restoring “Life, Liberty, and the Pursuit of Happiness” in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 495 (2011) (“The founding generation’s incorporation of Hutcheson and Beccaria’s language of ‘the greatest happiness of the greatest number’ was just one way of phrasing the representative political theory embodied by preserving liberty and ensuring the ‘pursuit of happiness.’ Often the terms ‘public good,’ ‘common good,’ or ‘good of the whole’ were alternative and interchangeable ways of phrasing the same principle.”).

²⁴⁸ A. OWEN ALDRIDGE, *THOMAS PAINE’S AMERICAN IDEOLOGY* 71 (Cranbury, NJ: Associated University Presses, 1984); JONATHAN I. ISRAEL, *DEMOCRATIC ENLIGHTENMENT: PHILOSOPHY, REVOLUTION, AND HUMAN RIGHTS 1750-1790*, at 452 (Oxford: Oxford University Press, 2011).

Genovesi, as “that wise observer on governments.”²⁴⁹ A close friend of Dr. Benjamin Rush, Paine had spoken extensively with Dr. Rush before the publication of *Common Sense*; Dr. Rush reviewed Paine’s draft copy and even suggested the title for Paine’s book.²⁵⁰

Giacinto Dragonetti has been aptly described as “an obscure Italian,” and the rarity of Dragonetti’s *Treatise on Virtues and Rewards*—making it an extremely rare book, indeed—is likely due to a 1770 fire that destroyed the stock of the radical printer Joseph Johnson.²⁵¹ As the scholar David Wootton has explained, there are many misconceptions about Dragonetti and his writings, some caused by variant French and English translations of the Italian text. As Wootton writes of misconceptions about Dragonetti: “He was a conservative author, we are told: a strange claim to make about an enemy of feudalism. He was an opponent of Beccaria, we are told: he was in fact a disciple.” On the issue of translations, Wootton, notes:

We can summarize the differences between the texts straightforwardly: the French editor thinks Dragonetti too radical, revises him in a monarchist direction, and adds conservative remarks in the notes; the English editor thinks the resulting text too conservative, refuses to translate at least one monarchist sentiment, and quarrels in his notes with the monarchism of his French counterpart. Dragonetti admires Rousseau; his French translator criticizes Rousseau; his English translator defends him. Paine, reading Dragonetti in English, was reading a distinctly republican text, one whose editor wanted to assimilate all kings to tyrants.

²⁴⁹ LUIGINO BRUNI, *THE GENESIS AND ETHOS OF THE MARKET* 137-39 (New York: Palgrave Macmillan, 2012). Dragonetti’s ideas were in line with Beccaria’s, with Beccaria himself writing: “Another means of preventing crimes is to reward virtue. I notice that the laws of all nations today are totally silent on this matter.” *Id.* at 140.

²⁵⁰ JOHN P. KAMINSKI, ED., *CITIZEN PAINE: THOMAS PAINE’S THOUGHTS ON MAN, GOVERNMENT, SOCIETY, AND RELIGION* 6 (Lanham, MD: Madison House, 2002).

²⁵¹ DAVID WOOTTON, ED., *REPUBLICANISM, LIBERTY, AND COMMERCIAL SOCIETY, 1649-1776*, at 414 n.136 (Stanford, CA: Stanford University Press, 1994).

“Then, as now,” Wootton adds, “the only way to find out about Dragonetti is to read him,” with Wootton speculating that the only way Thomas Paine would have had a quotation from Dragonetti at his fingertips in Pennsylvania in 1776 is if he “had brought a copy of *Virtues and Rewards* with him in his luggage as he traveled (first class) across the Atlantic.” In any case, what seems crystal clear is that Dragonetti’s book came about only after the runaway success of Beccaria’s treatise. As Wootton writes: “Both in England and in France, Dragonetti was published to capitalize on the publishing success recently enjoyed by Beccaria. Beccaria had discussed the criminal law, the philosophy of punishment, in utilitarian terms, and had attacked capital punishment in particular.” “Dragonetti’s purpose,” Wootton explains, “was to balance Beccaria by looking at the positive functions of government: How could government reward virtue, and foster happiness?” “The Age of Paine,” Wootton concludes, “was an age of iron bridges, as well as paper constitutions; an age of public benefits as well as private profits; an age of new learning as well as classical traditions; of Beccaria as well as of Machiavelli and Locke.”²⁵²

America’s founders, looking for the best way to structure government and reduce crime, familiarized themselves with books of all kinds, including ones written by Italian writers. For example, in a 1793 letter to Alexander Hamilton, Samuel Paterson—an Edinburgh bookseller—wrote this: “I have Sent you the Speech of Mr. Erskine at London on the Liberty of the Press—also a Translation

²⁵² Id. at 36-39.

on Legislation from the Italian of Filangieri.”²⁵³ The introduction to the translation of Filangieri’s work that Hamilton was sent stated forcefully: “The present common object of thinking men is legislation. The errors of jurisprudence surround us: every writer seeks to expose them; and from each extremity of Europe to the other, one voice alone is heard, which tells us, the laws of Latium are no longer calculated for Europe.” “This union of voices, this universal clamour, this cry of reason and philosophy,” the introduction continued, “has at length reached the Throne. The scene has changed, and Princes have begun to discover, that the lives, and the tranquility of men, demand greater regard; that there are means, independent of force and arms, to arrive at greatness; that good laws are the only support of national happiness; that the goodness of laws is inseparable from their uniformity; and that this uniformity is not to be found in a legislation framed at intervals during twenty-two centuries . . . with all the cruelty of the Lombards.”²⁵⁴ A central theme of Beccaria’s own work, of course, had been the pursuit of good laws that would further the public’s happiness.

The month before the Continental Congress issued the Declaration of Independence, Josiah Quincy—writing from Braintree, Massachusetts in June 1776—sent a telling letter to John Adams. “Your worthy Lady has been so good

²⁵³ Samuel Paterson to Alexander Hamilton, Feb. 16, 1793, *available at* wwwFOUNDERS.archives.gov (citing Gaetano Filangieri, *An Analysis of the Science of Legislation*, translated by W. Kendall (London, 1791)). William Kendall’s translation, published in London in the early 1790s, was the first English translation of Filangieri’s work. At that time, Kendall only translated the first book; the edition of 1806 covered books one and two. “Gaetano Filangieri and Benjamin Franklin: The Relationship Between the Italian Enlightenment and the U.S. Constitution,” pp. 65-66, *available at* http://sedi2.esteri.it/sitiweb/AmbWashington/Pubblicazioni/2_filangieri_interno.pdf.

²⁵⁴ GAETANO FILANGIERI, *AN ANALYSIS OF THE SCIENCE OF LEGISLATION, FROM THE ITALIAN OF THE CHEVALIER FILANGIERI* 3-4 (London: G. G. J. & J. Robinson, William Kendall, trans., 1791).

as to lend me a Pamphlet printed at Philadelphia intituled ‘Thoughts upon Government,’” Quincy began, alluding to John Adams’ wife Abigail and John Adams’ essay, written in the spring of 1776. “I have perused it with Pleasure, because, in general,” Quincy wrote of the ideas on *Thoughts on Government*, “they are agreeable to my own.” “It is difficult to contract, without the Limits of a Sheet of Paper,” Quincy wrote in his letter, “ones Thoughts upon such a *copious Subject*; however, I have selected the following for your Amusement; and when you are not better employed, please to let me know how you like them.” Quincy’s thoughts on government, like those of the Italian Enlightenment, focused on happiness, as Quincy communicated to Adams in his letter. As Quincy wrote, sounding Beccarian themes and humbly confessing that he thought Adams, his correspondent, “so much better understood” the subject of his letter “than I could pretend to”:

It would be impious to suppose, when the Deity gave Existence to the human Species, that, his *Wisdom* did not provide them the Means of as much Happiness, as his *Goodness* inclined him to bestow, upon Creatures of their Rank in the Scale of Beings: But, it is no Impeachment of his Wisdom or Goodness to say, that the Degree of their Happiness, should be in Proportion to their Care and Diligence, in the Improvement of the Means of it.

The *selfish* as well as *social Passions* were, doubtless, designed as Means of our Happiness: But, from the *opposite Attraction* of their respective Objects would, probably, have proved ineffectual, had not our universal Parent, in every Age, endued, *certain Individuals*, with a superior Understanding above *the Rest*, and disposed them to restrain the Vices, correct the Errors, and improve the Minds and Morals of the *Multitude*, who would, otherwise, have remained in Ignorance and Barbarism; as is still the Case, to the Disgrace of human Nature, in some Countrys: Hence the Necessity of Government and Laws: But here an important Question arises: By what *Criterion* are, these *rare Geniusses* to be distinguished? Since, melancholly Experience has taught Mankind, that Integrity and Wisdom are,

not *inseparably* connected with a refined Understanding: On the contrary, History is replete with Instances, of Men of the *greatest Abilities*, who have perverted them to the *worst Purposes*: To make their fellow Creatures *miserable* insted of making them *happy*: To make them *Slaves*, insted of preserving and securing their *Freedom*: Inestimable, therefore, would be the Worth of that Man, his Memory blessed, and his Name immortal, whose Genius and Address enabled him to contrive, and render acceptable, a Constitution of Government, upon such Principles, as in the Administration of it should be effectual, for the Suppression of *Vice*, and Encouragments of *Virtue*; because, *publick Happiness depends upon publick Virtue*.

Whoever duely attends, to the Process of animal and vegetable Life, in the first Stages of it will find, *the Fermentation* of the Juices, in both, exceeding slow; but, astonishingly rapid, before it produces those Effects which discover, the *inexhaustible Goodness of unerring Wisdom*. In the Refinement of *head Matter*, by the Art of Man, if the refining Materials are not gently applied, and in small Quantities at first, the Process will be greatly obstructed; but, the Heat must be intense, and the Fermentation violent, before that *brilliant Luminary* can be produced, which gives such a Lustre to all around it: By a very simple Analogy, therefore, may it not be justly inferred, that, in the Process of *political Refinement*, in the first Stage of it, the Fermentation ought to be as gentle as possible, but, gradually increased, from Stage to Stage, 'till the *Rays of Wisdom*, like the Rays of the Sun, in the *Focus of a burning Glass* are collected, in the *Supreme Legislative*, and from thence expanded, like the vital Flame in the *natural Body* to animate, and invigorate every Part of the *Body politick*? Permit me to explain my Meaning. The Inhabitants in each of these Colonies are scattered, over such an Extent of Territory, as renders their assembling in Person, for the Purpose of forming a Constitution of Government impracticable; But, if this Difficulty could be removed, such a numerous Assembly would be only a *many headed Monster*; incapable of Action, or acting, at best, to no valuable Purpose: It follows, therefore, upon the Principles above mentioned, that the scattered Sparks of Wisdom should be collected from the Multitude, by a *slow and equal Fermentation*; or, in other Words, by an *equal Representation*. An *unequal Representation*, would in Time, be productive of fatal Consequences.

Had *Britons* been *equally represented* they would not have patiently suffered, *the Ferocity of a royal Despot*, to plunder the Property, destroy the Towns, and wantonly shedd the Blood of their innocent Brethren in America: But, the Consequences of their being *unequally represented* are, that, *their Sovereign is absolute*,

their Chains are rivetted and they are no longer a free People! How cautious, therefore, ought Mankind to be, in originating the Powers of Government! How carefull, to reserve to themselves, a due share in framing the Laws which are to be the Rule of their Conduct, and a constitutional Controll over those to whom, the Administration of Government, and the Distribution of Justice are intrusted! To keep it always in their Power, *with a firm Resolution*, to reward, and punish with a liberal, but impartial Hand; and to guard with *a watchfull Eye* every Avenue of Bribery and Corruption.

Innovations in Governments long established, are, doubtless, attended with Hazard; and ought not to be admitted without an apparent Probability of great Advantage to the State: But the present Governments of these Colonies are, upheld only by *Courtesy and Consent*; and it is become absolutely necessary, that new ones should be formed, upon Principles most conducive to the Happiness and Security of the People who are to be subject to them: I ask therefore, upon the foregoing Scheme of political Refinement, in the *first Stage* of the Process, whether it would not be the best Mode of collecting, the scattered Sparks of Wisdom from the People at large, were they to be represented, in the most equal Manner that can be devised, in *a Country Convention*; with a *Rotation* of the Members *by Lot*, the two first Years, the third year involving a perpetual Series? and whether, it would not be in some Measure a Bar, tho not an effectual One, to the enormous Vice abovementioned?

The scattered Sparks of Wisdom being thus collected from the People, will not their Representatives in Convention, be better qualified, by all the Difference between *an ignorant Multitude*, and *a few wise Men* selected from them, to proceed to the *second Stage* of the foregoing Process and chuse, with Discretion and Judgment, out of their own Body, or from their Constituents, such a Number of Persons, and under such Qualifications as shall be by Law established, *to represent the County* in the General Assembly? The Election of Representatives for the County being finished: The Time of the Convention's sitting limited, and the Pay of the Members settled *by Law*: Why may not those Matters, of little or no Importance, which used to *waste* the Time, and *disgrace* the Dignity of former General Assemblies, be considered, and determined upon in the County Convention, as the proper Objects of their Deliberation, with a Right of Appeal to those, who shall apprehend themselves aggrieved by their Decisions? Would not the *capital Objection*, of an Assembly too numerous and expensive, by this Mode of Representation, be removed? Would the People have any Body to blame, but themselves in the Choice of their Representatives in

Convention, if *They* did not chuse the best Men in the County, to represent Them and their Constituents in the general Assembly? Would not the House of Commons in each Colony, by such a Constitution consist, of the most suitable Number of Persons, and the best qualified for the Purposes of Colony Legislation?

The Wisdom of the Representatives of the People, in their respective County Conventions, being thus collected, and one Branch of the colony Legislative formed: Let the Commons proceed to the *third Stage* in the Process of political Refinement, and form, by an unbiassed Choice, *a colony Council*, or second legislative Department in the State; consisting of such a Number, and of such Qualifications, as are suitable to the Dignity, and Importance of the Trust to be reposed in them.

The Wisdom of the Community being thus sublimated, and composing two distinct Branches of the legislative Body, and the Powers of each respectively settled, and determined by Law: Let them proceed to the *fourth Stage* in the Process abovementioned, and chuse by joint Ballot, unconfined to any other Limits, than the Colony, A President, vice President, Treasurer, and such other executive Officers, as shall be found necessary, for the well ordering, and governing the People within the Limits of their Jurisdiction.

A colonial Government being, thus model'd and established: The Relation and Connection formed, and to be formed, with the other Governments upon the Continent, and the best Mode of forming, a supreme Legislative over the WHOLE, will, doubtless, be some of the first Objects of each Colony's Attention; as they are certainly some of the most interesting and important, that ever did, or can come under the Deliberation of human Wisdom: For this Purpose, therefore, and as the *fifth Stage* in the Process of political Refinement, let each Colony exercise, their best discretion and Judgment, in the Choice of such Persons as they shall think, most suitably qualified to represent them in the Assembly of the *States General*, or *continental Assembly*.

The Wisdom of each Colony being, by this or some similar Mode collected, in a continental Assembly, They will be necessarily led to the *sixth and last Stage* in the foregoing Process: vizt., forming *a supreme Legislative*; which, to consider minutely exceeds, not only the Limits of a Letter, but, the Capacity of your Friend: However, *Lord Chatham* in his Speech before the House of Lords, the 20th: Jany. 1775 said: "For genuine Sagacity: For singular Moderation: For solid Wisdom, manly Spirit, sublime Sentiments, and simplicity of Language: For every thing respectable and honorable, the Congress of Philadelphia shine unrivaled." May we not, therefore, rest assured, that, *such an Assembly of Sages*, will confirm his Lordship's Judgment; and

demonstrate to the World, that it is within the Reach of human Wisdom, *duely sublimated*, to “fix the true Point of Happiness and Freedom” by framing, and establishing a Constitution of Government upon such Principles, as shall to endless Ages be productive of, “the greatest Sum of individual Happiness, with the least national Expence.”

The last two quotations came directly from Giacinto Dragonetti, the author of *A Treatise on Virtue and Rewards*, as had been quoted by Thomas Paine in *Common Sense* just months earlier. It seems likely that Colonel Josiah Quincy got them from Paine’s book, simply repeating them in his letter to John Adams. By signing off “Your affectionate and faithfull humble Servant,” Josiah Quincy made a request: “If my worthy and honored Friend Docter Franklin is returned to Philadelphia pray present my respectfull Compliments of Congratulation to him, with Thanks for his obliging Letter of the 15 of last April, which came safe to hand: Please to acquaint him with the Contents of this long Letter, so far as you think them worthy of his Notice.” Benjamin Franklin had returned to Philadelphia from Canada on May 31st, with the Quincy family being a prominent political family in Massachusetts and connected to the Adams family through Abigail Adams, the daughter of the Reverend William Smith (1707-1783) and his wife Elizabeth, of the Quincy family. Colonel Josiah Quincy (1710-1784)—the author of the June 1776 letter to John Adams—was a Revolutionary War soldier, while Josiah Quincy, Jr. (1744-1775), was an attorney who had, like John Adams, quoted Beccaria’s treatise at the Boston Massacre trial. Josiah Quincy, Jr. had died at sea on his way back from a mission to London.²⁵⁵

²⁵⁵ Josiah Quincy to John Adams, June 13-25, 1776; 4 ROBERT JOSEPH TAYLOR, ED., PAPERS OF JOHN ADAMS 538 (Cambridge: Belknap Press of Harvard University Press, 1979); ELIZA SUSAN QUINCY, ED., JOSIAH QUINCY, MEMOIR OF THE LIFE OF JOSIAH

Beccaria's ideas—echoed in Colonel Josiah Quincy's letter, which spoke of misery and happiness—were often consulted in eighteenth-century America. For instance, Josiah Quincy, Jr. had referred to Beccaria's *On Crimes and Punishments* in his law commonplace book, including an excerpted selection from Beccaria's treatise captioned "The Danger of Considering y^e Spirit of Laws." "There is nothing more dangerous," Quincy recorded, "than the common axioms: *the spirit of the laws is to be considered*. To adopt it is to give way to the torrent of opinion. This may seem a paradox to vulgar minds, which are most strongly affected by the smallest disorder before their eyes, than by the most pernicious, tho' remote, consequences produced by one false principle adopted by a nation." Quincy then copied this extended passage from Beccaria's treatise:

The disorders that may arise from a vigorous observation of the *letter* of penal laws, not to be compared with those produced by y^e interpretation of them. The first are temporary inconveniences which will oblige y^e legislator to correct y^e letter of y^e law, the want of preciseness, + uncertainty of which has occasioned these disorders; and this will put a stop to the fatal liberty of explaining; the source of arbitrary + venal declarations. When y^e code of laws is once fixed, it should be observed in y^e *literal* sense, + nothing more is left to y^e judge, than to determine, whether an action be, or be not conformable to the written Law. When the rule of right which ought to direct the actions of the philosopher, as well as the ignorant, is a matter of controversy, not a fact, the people are slaves to the magistrates.

Quincy's commonplace book also included material from Montesquieu's *L'Esprit des Lois* (1748) and on the subject of natural law, copying, for example, the ideas

QUINCY, JUNIOR, OF MASSACHUSETTS BAY: 1744-1775 BY HIS SON JOSIAH QUINCY x, 26-29, 285-87, 323 (Boston: Little, Brown, and Co., 3d ed. 1875); BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 174; John F. Tobin, *The Boston Massacre Trials*, 85-AUG N.Y. ST. B.J. 10 (July/Aug. 2013).

of Jean Jacques Burlamaqui (1694-1748) and Emmerich de Vattel (1714-1767). Elsewhere, Quincy carefully recorded in Latin “Maxims of the Civil Law.”²⁵⁶

Josiah Quincy, Jr. had also recited the much-invoked quote from Beccaria on the height of power versus misery in commenting on the Boston Port Act of 1774 in the wake of the Boston Tea Party. As Quincy recorded Beccaria’s words in his May 1774 *Observations on the Act of Parliament Commonly Called the Boston Port-Bill; with Thoughts on Civil Society and Standing Armies*: “[I]n every society, there is an effort constantly tending to confer on one part the height of power, and to reduce the other to the extreme of weakness and misery.” Right before quoting that passage from Beccaria’s treatise, Josiah Quincy, Jr. wrote in the same paragraph: “The proper object of society and civil institutions is the advancement of ‘the greatest happiness of the greatest number.’” Dated May 14, 1774, Quincy’s *Observations*—commenting on the statute of George III “to discontinue, in such Manner, and for such Time as are therein mentioned, the landing and discharging, the lading or shipping of Goods, Wares, Merchandize, at the Town, and within the Harbour of Boston”—were said by Quincy himself to

²⁵⁶ 2 DANIEL R. COQUILLETTE & NEIL LONGLEY YORK, EDS., *PORTRAIT OF A PATRIOT: THE MAJOR POLITICAL AND LEGAL PAPERS OF JOSIAH QUINCY JUNIOR* 62-66, 68, 179-82, 185, 227-29, 325, 340-41, 344-45 (Boston: The Colonial Society of Massachusetts, 2007) (quoting Josiah Quincy Jr.’s law commonplace book); *compare* id. at 66 (“Some of Quincy’s excerpts seem directly contradictory, such as the section from *Hobart’s Reports* (1641), ‘Judges have liberty + authority over statutes to mould them to the truest + best use, according to reason + best use, according to reason + best convenience.’”).

reflect the appearance of being “*thrown together in haste*” as “*the Writer was out of Town on business, almost every day, the Sheets were printing off.*”²⁵⁷

Josiah Quincy Jr., it seems, pulled his quote from Beccaria out of his own political commonplace book. In that source, Quincy had recorded two separate observations of Beccaria, drawn from an edition of *On Crimes and Punishments* published in London by John Almon in 1767. In the first entry, on the topic “Of Society,” Quincy recorded this extended passage from Beccaria’s treatise into his political commonplace book:

In *every* human society, there is an effort *continually* tending to confer on one part the height of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to oppose this effort, and to diffuse their influence universally and *equally*. But men generally abandon the care of their most important concerns to the uncertain prudence, and direction of those, whose interest it is to reject the best, and wisest institutions; it is not till they have been led into a 1000 mistakes in matters the most essential to their liberties, and are weary of suffering that &c. Beccaria, *Crimes and Punishment*, p. xi.

The second passage from *On Crimes and Punishments* that Quincy recorded in his political commonplace book was short and sweet: “The sum of all the portions of the liberty of each Individual constitute the sovereignty of a State.”²⁵⁸

²⁵⁷ 6 DANIEL R. COQUILLETTE & NEIL LONGLEY YORK, EDS., *PORTRAIT OF A PATRIOT: THE MAJOR POLITICAL AND LEGAL PAPERS OF JOSIAH QUINCY JUNIOR 185-86*, 202, 235 nn.39-40 (Boston: The Colonial Society of Massachusetts, 2007)

²⁵⁸ 1 DANIEL R. COQUILLETTE & NEIL LONGLEY YORK, EDS., *PORTRAIT OF A PATRIOT: THE MAJOR POLITICAL AND LEGAL PAPERS OF JOSIAH QUINCY JUNIOR 122-23*, 127, 202-3 (Boston: The Colonial Society of Massachusetts, 2007). In his political commonplace book, Josiah Quincy Jr. also recorded passages from Boswell’s book on Corsica, noting, among other things: “Liberty is so natural, and so dear to mankind, whether as Individuals, or as members of society, that is indispensably necessary to our happiness. Everything great and worthy ariseth from it.” “Particular punishments are the cure for accidental distempers in the State; they inflame rather than allay those heats which arise from settled mismanagement of government, or from a natural indisposition

Of course, Beccaria was not the only Italian writer who came to the public's attention. Milan, like Naples and other parts of Italy, produced many writers and intellectuals who opposed tyrannical practices. One of those was Giuseppe Gorani (1740-1819), the author of *Il vero dispotismo*—a two-volume work published in “‘Londra’ (i.e., Geneva), 1770.” According to Jonathan Israel’s *Democratic Enlightenment*: “This was an incisive work of political thought composed in Milan, in 1769, and banned by the Inquisition with the full agreement of the forces of *moderazione* in August 1773. It was a work distinguishing between ‘tyranny’ as something always malign and ‘despotism’ that can be bad or good depending on whether or not it is infused by *l’esprit philosophique* and true ‘virtue’.” Gorani—described as “an adventurous, well-travelled nobleman” who had spent time abroad as an officer in the Habsburg Austrian army, as a prisoner in Prussia, and in Paris where he interacted with several *philosophes*—first garnered attention in 1767-1769 among the Milanese circle associated with *Il caffè*; “[h]is principal mentor in ‘philosophy,’” Israel notes, “was Beccaria whom he venerated and who read his drafts, encouraging his ambitions as a political thinker.” “His original goal,” Israel notes of Gorani’s project, “was to combine Austrian enlightened despotism, or Josephism, with more individual and collective freedom.” “On appearing, in two volumes at Geneva in January 1770,” Israel writes of Gorani’s *Il vero dispotismo*, “his book met with critical reactions ranging from qualified approval, as with Verri who noted its kinship with Beccaria’s masterpiece, to outrage at what commentators

in the people. It is of the utmost moment not to make mistakes in the use of strong measures” Id. at 165-66.

considered undisguised sedition and irreligion.” *Il vero dispotismo*, Israel notes, “brims with references to Machiavelli, Sarpi, Giannone, and Beccaria, besides Helvétius and Diderot, both of whom he warmly praises besides Rousseau.”²⁵⁹

In August 1792, in the midst of the French Revolution, France’s National Assembly granted honorary French citizenship to a number of persons who had promoted the cause of liberty. Giuseppe Gorani—who, by 1787, had rejected “enlightened despotism” in favor of representative democratic republicanism—was among the selected honorees along with a number of American and English luminaries such as George Washington, Alexander Hamilton, James Madison, Thomas Paine, Jeremy Bentham, William Wilberforce and Joseph Priestley. Writing from Paris to Alexander Hamilton, Jean Marie Roland enclosed the printed act of August 26, 1792, “which confers the title of Citizen François” upon “several foreigners,” with the French Minister of the Interior adding that the French Republic had placed the honorees “among the friends of humanity & society.” The “whereas” clauses in the act made clear its purpose: “whereas men who, through their writings and by their courage, have served the cause of freedom, and prepared the emancipation of the people, can not be regarded as foreign”; “if five years of residence in France, are sufficient for a foreign citizen François title, this title is more justly due to those who, regardless of the soil they inhabit, have devoted their arms & their watches to defend the cause of the people

²⁵⁹ JONATHAN ISRAEL, *DEMOCRATIC ENLIGHTENMENT: PHILOSOPHY, REVOLUTION, AND HUMAN RIGHTS 1750-1790*, at 359-62 (Oxford: Oxford University Press, 2001); *see also* POVOLO, *THE NOVELIST AND THE ARCHIVIST*, *supra* note 38, at 81 n.17 (“The Milanese Gorani was familiar with Giulia Beccaria’s circle, and he kept track of her even from his distant exile in Geneva.”).

against the tyranny of kings, to banish the stigma of the earth, and to push the limits of human knowledge.”²⁶⁰

g. Philip Mazzei, the Italian-American

Philip Mazzei—the Italian immigrant who had extensive interactions and correspondence with Thomas Jefferson, among many other American revolutionaries—has been almost as forgotten by Americans today as Cesare Beccaria and his republican pupil, Giuseppe Gorani. Born in 1730 in a small town near Florence, in Tuscany, Mazzei studied medicine at a hospital in Florence before moving to Pisa. After spending three years in Constantinople, he went to London in 1756, and spent nearly 18 years there, establishing the firm of Martini & Co. to import wine and olive oil into England. He later added candies, cheese and pasta to his thriving import business. A successful businessman, Mazzei—an avid reader and writer—visited his native country in 1765, but was banned by the Inquisition on the charge of importing “forbidden books” into Tuscany. A Roman priest had accused Mazzei of printing works by Voltaire and Rousseau, and Mazzei got a letter from his friend Raimondo Cocchi that advised: “A charge against you has been received here in which it is stated that you put an immense quantity of forbidden books on board a ship bound for Genoa, Leghorn, Civita Vecchia, Naples, and Messina in order to infect all of Italy.” Only through some influential friends was the Inquisition-era charge lifted. Mazzei was allowed to return to Tuscany, and though Mazzei returned to London in 1767 to continue his

²⁶⁰ To George Washington from the National Assembly of France, Aug. 26, 1792 & To Alexander Hamilton from Jean Marie Roland, Oct. 10, 1792, *available at* wwwFOUNDERS.archives.gov.

business as a merchant and wine importer, he was determined to “hasten the abolition of the Inquisition in Tuscany.”

At that time, Leopold II (1747-1792) was the Grand Duke of Tuscany, a title he held from 1765 to 1790. It was through the Grand Duke of Tuscany’s order of two Franklin stoves that Mazzei met Benjamin Franklin and other Americans in London, with Mazzei eventually deciding to form a company for the promotion in Virginia of silk worms, grapes and olives. Thomas Adams, a Virginia merchant residing in London, had suggested to Mazzei that Virginia would be an ideal location to grow vines, olive trees, and mulberry trees for silkworms, thus allowing for a silk industry. Franklin and Adams had also touted America’s anti-aristocratic culture, and after a long-running dispute in which the British Parliament refused to seat a duly elected MP, John Wilkes, after his election by Middlesex voters, Mazzei saw the Parliament’s actions as “a death blow to the solid and sacrosanct fundamental law of a free country, which is perfect freedom in the election of the representatives of the people.” Mazzei sold his London business, settled his accounts, then returned to Italy to prepare for a move to the New World. After recruiting men, gathering supplies, and leaving the port of Leghorn on September 2, 1773, Mazzei and his men—along with Mazzei’s mistress—made their way to Virginia after a three-month voyage.

In Virginia, then still a British colony, Mazzei met Thomas Adams in Williamsburg. He quickly befriended George Washington, Thomas Jefferson and Jefferson’s friend and mentor, the lawyer and jurist George Wythe. At Monticello, Jefferson and Mazzei walked the grounds and hit it off, and Adams

remarked to Jefferson, “I see by your expression that you’ve taken him from me; why, I expected as much.” The dwelling at *Colle* (Italian for “hill”), Mazzei’s estate next to Monticello, was built by slaves supplied by Jefferson, with the estate itself acquired through funds raised by a company of which Jefferson, Washington, George Mason, and Virginia’s then-governor, Lord Dunmore, were members. Jefferson let Mazzei stay at Monticello as Mazzei’s acreage was cleared and his new home built. Shortly after his arrival in what would become the United States, Stefano Bettoia, a good friend residing in Lucca, who assisted Mazzei in his business affairs, sent two horses and six young men from Italy to aid Mazzei in his agricultural pursuits. As events unfolded, Mazzei eagerly joined in the opposition to British rule, speaking in churches on behalf of the American cause. During the Revolutionary War itself, Mazzei would seek funds from the Tuscan sovereign to aid the American cause; Bettoia would assist Mazzei in that endeavor, too, by passing a letter to the Grand Duke of Tuscany from a “Citizen of the World,” a pseudonym that Mazzei used along with “Furioso.” Mazzei and Jefferson, who spent a lot of time together at Monticello, were destined to be life-long friends.²⁶¹

²⁶¹ LYONS, *FOREIGN-BORN AMERICAN PATRIOTS*, *supra* note 111, at 6-10; HOWARD R. MARRARO, ED., *PHILIP MAZZEI, VIRGINIA’S AGENT IN EUROPE: THE STORY OF HIS MISSION AS RELATED IN HIS OWN DISPATCHES AND OTHER DOCUMENTS* 5-6, 23 & n.18, 24 (New York: The New York Public Library, 1935); JOHN DAVID SMITH & THOMAS H. APPLETON, JR., EDS., *A MYTHIC LAND APART: REASSESSING SOUTHERNERS AND THEIR HISTORY* 9 (Westport, CT: Greenwood Press, 1997); *see also* Thomas Jefferson to Philip Mazzei, Apr. 4, 1780 (“Indeed you can form no conception how much our wants of European commodities are increased tho’ the superiority of the French and Spanish fleets in Europe, and their equality here have reduced the risk of capture to be very moderate. Hearing of Mr. Bettoia’s captivity and distress in New York, I wrote to him making a tender of any services I could render him. But I have since heard he had left that place before my letter could have got there.”).

Mazzei had personal experience with oppression by Italian religious authorities, and Jefferson and Mazzei—political soulmates of sorts—were zealous advocates of liberty and religious freedom. In the 1774-1775 time period, Mazzei contributed articles to John Pinkney’s *Virginia Gazette*, writing under the pseudonym “Furioso” and saying “British liberty” was illusory. A year before Jefferson drafted the Declaration of Independence, Mazzei wrote a piece for the *Virginia Gazette*, which Jefferson translated and which read:

In order to achieve our end, my dear fellow citizens, we must discuss man’s natural right and the grounds of a free government. Such a discussion will clearly show us that the British Government has never been free at the peak of its perfection and that our own was nothing more than a bad copy of it. . . . But the time has come to change ways. . . . *All men are by nature equally free and independent. Their equality is necessary in order to set up a free government. Every man must be equal of any others in natural rights.* Class distinction has always been and will always be an effective obstacle and the reason for it is very clear. When in a nation you have several classes of men, each class must have its share in the government, otherwise one class will tyrannize the others.²⁶²

The similarities between Mazzei’s ideas and Jefferson’s later writings, including in the Declaration of Independence, is—to borrow a familiar expression—self-evident.²⁶³

²⁶² HOWARD R. MARRARO, ED., PHILIP MAZZEI, VIRGINIA’S AGENT IN EUROPE: THE STORY OF HIS MISSION AS RELATED IN HIS OWN DISPATCHES AND OTHER DOCUMENTS 6 (New York: The New York Public Library, 1935); LYON, FOREIGN-BORN AMERICAN PATRIOTS, *supra* note 111, at 11.

²⁶³ MICHAEL KRANISH, FLIGHT FROM MONTICELLO: THOMAS JEFFERSON AT WAR 45 (Oxford: Oxford University Press, 2010) (“Jefferson and Mazzei together published anonymous letters in the *Virginia Gazette*. One such item, written in French by Mazzei and translated into English by Jefferson, told Virginians, ‘All men are by nature equally free and independent. Such equality is necessary in order to create a free government. Every man must be the equal of any other in natural rights.’ Later this would be cited by some as evidence that Mazzei had inspired ‘All men are created equal.’”).

After the Revolutionary War broke out, Mazzei—prior to being tasked with employing his skills in Europe—joined the Independent Company of Albemarle to repel enemy forces. Writing to John Page on January 11, 1777, Mazzei said he was “preparing to march to the Continental Camp with as many volunteers as I shall be able to persuade.” Having written *Instructions to the Freeholders of Albemarle County to Their Delegates in Convention*, wherein Mazzei sought to restructure relations between the ruled and their ruler, Mazzei sent an Italian translation of the Declaration of Independence to the Grand Duke of Tuscany, a translation published in Tuscan newspapers. In a sign of the trust reposed in him, Mazzei was, as noted, later sent as an envoy to Europe to seek financial assistance, with Mazzei also seeking supplies for Virginians during the war effort. In an October 1778 letter to Massachusetts’ John Hancock, Thomas Jefferson had sought a solution to the lackluster resources of the Continental force, recommending Mazzei in these words:

An acquaintance with two Italian gentlemen who have settled in my neighborhood has been the means of my becoming acquainted with some facts which may perhaps be of some use to the general cause. The Grand Duke of Tuscany by great œconomy & a particular attention to the affairs of his treasury has I understand a very large sum in ready money which it is thought he would readily put out to interest, more especially if it was proposed not to carry it out of his state, but to invest it in necessaries there. Having also established at his own expence public manufactures for the employment of his poor, it is said he has immense magazines of these which he would without doubt gladly furnish on credit.—The Genoese are among the richest people in Europe One of the gentlemen of whom I spoke above (M^r Mazzei) is I think more likely to negotiate this matter to our advantage than perhaps a native alone. He possesses first rate abilities, is pretty well acquainted with the European courts, & particularly those abovementioned, is a native of Tuscany with good connections and I have seen certain proofs of the Grand Duke’s personal regard for

him. He has been a zealous whig from the beginning and I think may be relied on perfectly in point of integrity. He is very sanguine in his expeditions of the services he could render us on this occasion & would undertake it on a very moderate appointment. This, if Congress were to adopt the plan at all, they would order as they please: He thinks £600 sterl. would enable him to continue there a twelvemonth within which time it might be effected. I think the sum which would be hazarded of little consideration when compared with the benefits hoped for. I have taken the liberty of troubling you with this information, finding there are few others now remaining at Congress of my former acquaintance, & none for whom I have greater esteem. A love for the general cause makes me hazard it for the general service.²⁶⁴

Ultimately, the highly respected Mazzei, trusted by Virginians as a loyal supporter of the cause of American independence, was tasked with his mission: go to Europe as an agent for Virginia to try to assist the cause of his newly adopted home. As one source describes his appointment and his objective: “Because of his admirable qualifications for this mission—being a Tuscan by birth, a merchant of considerable experience, a judge of men and their motives, a writer—Mazzei received his appointment from Governor Patrick Henry and the Virginia Council, in January, 1779. He was authorized to obtain a loan of gold and silver, not exceeding £900,000, and to purchase goods in Italy for the use of the state troops.” Mazzei took an oath of allegiance to the Commonwealth of Virginia on April 21, 1779, and sailed from Hob’s Hole two months later with his wife, his step-daughter, and a friend, Francesco del Maglio. But from the start,

²⁶⁴ LYON, *FOREIGN-BORN AMERICAN PATRIOTS*, *supra* note 111, at 11-12; HOWARD R. MARRARO, ED., *PHILIP MAZZEI, VIRGINIA’S AGENT IN EUROPE: THE STORY OF HIS MISSION AS RELATED IN HIS OWN DISPATCHES AND OTHER DOCUMENTS 6-8* (New York: The New York Public Library, 1935). The second Italian to whom Jefferson likely referred was Carlo Bellini, a native of Florence whom Mazzei enticed to come to America. For 24 years, Bellini—a proficient language teacher—was a professor at the College of William and Mary, teaching French, German, Italian and Spanish. *Id.* at 16 n.7.

Mazzei ran into difficulties. The ship Mazzei boarded for Europe was captured by a British privateer, with Mazzei and his family taken to New York for interrogation and confinement, but not before Mazzei threw overboard a bag containing his official instructions and commission loaded down with a four-pound shot. To avoid a lengthy imprisonment, Mazzei insisted he was on a private trip to Tuscany, but he was held in New York anyway for three months.

After an English general on Long Island took notice of Mazzei, who had an established reputation as a businessman, Mazzei was placed on a cargo ship bound for Cork, Ireland. Mazzei, however, fell ill on board the ship, a condition that remained with him for three weeks after his arrival in Ireland. After befriending a Mr. Cotter, who lodged Mazzei during his illness and provided him with money for a voyage to Paris, Mazzei slipped away in the night to avoid detection and any possibility of the fate—imprisonment in the Tower of London—that had befallen South Carolina’s Henry Laurens, a plantation owner-turned-president of the Continental Congress who had been captured by the British at sea. In Paris, Mazzei called upon Benjamin Franklin, but Franklin—the seasoned diplomat—felt that foreign affairs should be conducted by Congress, not Virginia. And lacking his official papers because they had been thrown overboard, all Mazzei was able to do was send back dispatches—from Nantes, Paris, Genoa, Florence, Leghorn and Amsterdam—to then-Governor Thomas Jefferson back in Virginia and to his successor, Benjamin Harrison.

Mazzei’s mission did not achieve its objectives, though Mazzei, in Europe, did write newspaper articles like “The Justice of the American Cause”

and “Why the American States Cannot Be Accused of Having Rebelled.” Lacking credentials from Virginia, Mazzei was unable to convince the Grand Duke of Tuscany to extend any credit, with the Grand Duke convinced that Great Britain would never relinquish what it saw as its American colonies. Upon Mazzei’s return to America in November 1783 following the signing of the Treaty of Paris on September 3, 1783, he was greeted warmly by his Virginia friends, however. This resolution passed by the Board of Trade of Virginia is reflective of Virginians’ shared sentiments: “And the Board reflecting on the patriotic exertions of Mr. Mazzei in favor of this country in the aforesaid appointment are of the opinion that he has conducted himself therein with activity, assiduity and zeal, and that the ill sweep that has attended his business is by no means imputable to him but to certain coincident circumstances, and that his conduct merits the appreciation of the Board of which this is to be considered as a testimonial.” After returning to Europe once more, sailing from New York to France in June 1785, Mazzei reconnected with Thomas Jefferson in Paris and wrote *Recherches historiques et politiques sur les États-Unis de l’Amérique septentrionale*, a work about America published in four volumes in 1788.²⁶⁵ Written in Italian, the book—the title of which, in English, translates as *Historical and Political Researches on the United States of North America*—was hastily written by Mazzei in Italian, mostly from memory, but translated into French by a

²⁶⁵ LYON, FOREIGN-BORN AMERICAN PATRIOTS, *supra* note 111, at 13-14; HOWARD R. MARRARO, ED., PHILIP MAZZEI, VIRGINIA’S AGENT IN EUROPE: THE STORY OF HIS MISSION AS RELATED IN HIS OWN DISPATCHES AND OTHER DOCUMENTS 6-8 (New York: The New York Public Library, 1935); *see also* MARGHERITA MARCHIONE, THE FIGHTING NUN: MY STORY 124 (2000) (noting that Philip Mazzei published his four-volume history of United States in 1788, a work that received “a glowing two-installment review” from the Marquis de Condorcet).

Norman deputy in Parliament. The text of the very first volume of that work, advertised as written “By a Citizen of Virginia,” references Beccaria with approval. The first, second and third volumes also discuss *la peine de mort*—the punishment of death.²⁶⁶

In book one, Mazzei notes that “[t]he legislative branch always has the power to absolve delinquents” and that state executives could “pardon any condemned criminal” or “suspend execution in certain cases and grant pardon in others.” As translated into English, Mazzei then wrote this: “As long as we retain any vestige of our barbaric laws, the power to abrogate a sentence will be useful, but I hope that in the near future the legislator will be indulgent and humane, following Beccaria’s advice, and that the executive power will be inexorable.” A footnote to that quoted text—written by the Italian-American with whom Jefferson spent so much time—reads as follows:

All punishments should be proportionate to the offense. When no distinction is made between crimes, men are inclined to commit murder as quickly as to steal. For this reason cruel laws are contrary to justice, as the purpose of punishment is to correct men, not to exterminate them (Article 18 of the Declaration of Rights of New Hampshire, 31 October 1783). The Revolution is responsible for these just and humane reforms.²⁶⁷

²⁶⁶ 1 FILIPPO MAZZEI, RECHERCHES HISTORIQUES ET POLITIQUES SUR LES ÉTATS-UNIS DE L’AMÉRIQUE SEPTENTRIONALE 114, 209, 212 (1788); 2 FILIPPO MAZZEI, RECHERCHES HISTORIQUES ET POLITIQUES SUR LES ÉTATS-UNIS DE L’AMÉRIQUE SEPTENTRIONALE 116, 217 (1788); 3 FILIPPO MAZZEI, RECHERCHES HISTORIQUES ET POLITIQUES SUR LES ÉTATS-UNIS DE L’AMÉRIQUE SEPTENTRIONALE 15, 61 (1788); 4 FILIPPO MAZZEI, RECHERCHES HISTORIQUES ET POLITIQUES SUR LES ÉTATS-UNIS DE L’AMÉRIQUE SEPTENTRIONALE 353 (1788); CONSTANCE D. SHERMAN, ED. & TRANS., PHILIP MAZZEI, RESEARCHES ON THE UNITED STATES xv (Charlottesville, VA: University Press of Virginia, 1976).

²⁶⁷ SHERMAN, ED. PHILIP MAZZEI, RESEARCHES ON THE UNITED STATES, *supra* note 266, at 91.

In fact, Philip Mazzei recommended that Cesare Beccaria be added as an international member of Virginia's Constitutional Society along with other Enlightenment figures, including Florentine philosopher Felice Fontana. As Mazzei, in a letter to John Blair, described the purpose of the Constitutional Society, one that sought to further the Beccarian idea of publicizing the laws so all the people would know what they were: "It seems to me that in a truly free country, where national prosperity and happiness stand on the same foundation for everyone, the uneducated portion of the inhabitants has a right to be enlightened and advised by the educated citizens, just as a child is by his father." In another letter to John Adams, dated September 27, 1785, the Society's purpose was described this way: "I have always been of the opinion that Freedom cannot subsist for long in any country unless the generality of the people are aware of its blessing, and tolerably well acquainted with the principles on which alone it can be supported."²⁶⁸ In *On Crimes and Punishments*, Beccaria himself had written of the importance of education, with Mazzei—like so many Americans—embracing the principles of the "celebrated" Italian philosopher.²⁶⁹

Later the subject of considerable controversy, on April 24, 1796, Thomas Jefferson—writing from Monticello, and having already served as George Washington's Secretary of State from 1790 to 1793—sent a letter to his long-time friend Philip Mazzei, then in Tuscany. "In place of that noble love of liberty, & republican government which carried us triumphantly thro' the war," the politically ambitious Jefferson complained to Mazzei, "an Anglican monarchical,

²⁶⁸ LYON, *FOREIGN-BORN AMERICAN PATRIOTS*, *supra* note 111, at 14-15.

²⁶⁹ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 79-80, 399, 585.

& aristocratical party has sprung up, whose avowed object is to draw over us the substance, as they have already done the forms, of the British government.” “The main body of our citizens, however,” Jefferson advised, “remain true to their republican principles; the whole landed interest is republican, and so is a great mass of talents.” “Against us,” Jefferson wrote, “are the Executive, the Judiciary, two out of three branches of the legislature, all the officers of the government, all who want to be officers, all timid men who prefer the calm of despotism to the boisterous sea of liberty, British merchants and Americans trading on British capitals, speculators, and holders in the banks of public funds, a continuance invented for the purpose of corruption, and for assimilating us in all things to the rotten as well as the sound parts of the British model.”

Jefferson’s letter to the physician-trained Mazzei, then in Florence, pulled no punches, continuing: “It would give you a fever were I to name to you the apostates who have gone over to these heresies, men who were Samsons in the field and Solomons in the council, but who have had their heads shorn by the harlot England.” “In short,” Jefferson concluded, “we are likely to preserve the liberty we have obtained only by unremitting labors and perils.” “But,” Jefferson pledged, “we shall preserve it; and our mass of weight and wealth on the good side is so great, as to leave no danger that force will ever be attempted against us.” “We have only to awake and snap the Lilliputian cords with which they have been entangling us during the first sleep which succeeded our labors,” Jefferson told Mazzei, confiding in him in his private letter.²⁷⁰ George Washington was still the

²⁷⁰ HOWARD R. MARRARO, ED., PHILIP MAZZEI, VIRGINIA’S AGENT IN EUROPE: THE STORY OF HIS MISSION AS RELATED IN HIS OWN DISPATCHES AND OTHER DOCUMENTS

President of the United States when Jefferson sent his letter to Mazzei, and in less than a year's time, Jefferson would be the 2nd Vice President of the United States, serving under President John Adams.²⁷¹

A fellow republican, an overzealous Mazzei translated this letter into Italian and, without permission from Jefferson, had it published in Florence on January 1, 1797. It was then picked up by the French newspapers, and was spotted by an American who translated the French version into English and sent it on to the United States. By May 1797, not long after Jefferson's inauguration as Vice President, versions of Jefferson's letter to Mazzei—calling into question George Washington's administration—were appearing in American newspapers. The letter brought down on Jefferson, once a part of that administration, the wrath of the Federalist press, which even raised the specter of impeachment.²⁷² Jefferson's letter to Mazzei would be widely discussed in the press for decades to come and was widely reprinted, albeit with slight variations.²⁷³

6-12-13 (New York: The New York Public Library, 1935); Thomas Jefferson to Philip Mazzei, Apr. 24, 1796.

²⁷¹ RICHARD BUEL JR., *THE A TO Z OF THE EARLY AMERICAN REPUBLIC* 309-10 (Lanham, MD: Scarecrow Press, 2006).

²⁷² HOWARD R. MARRARO, ED., *PHILIP MAZZEI, VIRGINIA'S AGENT IN EUROPE: THE STORY OF HIS MISSION AS RELATED IN HIS OWN DISPATCHES AND OTHER DOCUMENTS* 12-13 (New York: The New York Public Library, 1935).

²⁷³ See, e.g., "From the Boston Gazette," *THE MARYLAND GAZETTE* (Annapolis, MD), July 18, 1816, p. 2 ("Copy of a letter written by Thomas Jefferson, late President of the U.S. to Monsieur Philip Mazzei; published in the Paris Moniteur 25th Jan. 1797, during the administration of the immortal Washington. 'Our political situation is prodigiously changed since you left us. Instead of that noble love of liberty and that *republican* government which carried us through the revolution, an *anglo monarchic-aristocratic party* has arisen. Their avowed object is to impose on us the (a) FORM of the British Government. Nevertheless the principal body of our citizens remain faithful to republican principles. We have against us the (b) EXECUTIVE power, the Judiciary power (*two* out of three branches of our government) all the officers of the government, all who are seeking office, all *timid* men, who prefer the calm of Despotism to the tempestuous sea of liberty"); *THE PITTSBURG GAZETTE* (Pittsburgh, PA), Aug. 10, 1833, p. 2

Mazzei, who led a full life, wrote a history of the American Revolution and an autobiography, *Memorie*, then fell ill and died in March 1816, his body buried in Pisa, the city in which he had lived. After Mazzei's death, in a July 18, 1816 letter to Giovanni Carmignani, Jefferson—writing from Monticello, and by then an ex-President—paid this tribute to his friend Philip Mazzei: “An intimacy of 40 years have proved to me his great worth, and a friendship which had begun in personal acquaintance, was maintained after separation, without abatement by a constant interchange of letters. His esteem too in this country was very general; his early & zealous cooperation in the establishment of our independance having acquired for him here a great degree of favor.” To his friend Thomas Appleton, Jefferson offered these personal reflections on Mazzei: “He had some peculiarities, & who of us has not? But he was of solid worth; honest, able, zealous in sound principles Moral & political, constant in friendship, and punctual in all his undertakings. He was greatly esteemed in this country, and some one has inserted in our papers an account of his death, with a handsome and just eulogy of him, and a proposition to publish his life in one 8 vo. volume.” “I have no doubt but that what he has written of himself during the portion of the revolutionary period he has passed with us,” Jefferson told Appleton, “would

(“we asserted that Jefferson had written a letter to Mazzei, *a foreigner, residing in Italy*, slandering Washington”); “Reputation of Calumnies,” PUBLIC LEDGER AND DAILY TRANSCRIPT (Philadelphia, PA), Feb. 15, 1850, p. 2 (“This letter to Mazzei is a signal proof of the malignity and dishonesty with which Jefferson has been pursued by some of his enemies. Signor Mazzei, an Italian republican, had resided for some years in Virginia, on intimate terms with Jefferson, and returned to Tuscany about 1791. Jefferson wrote to him in April 24, 1796, a letter which was afterwards translated into Italian, and published in Florence. From this Italian version it was translated into French, and published in Paris. From this French version it was translated into English, and published in the United States, to prove Jefferson’s ‘instinctive hatred of Washington!’”).

furnish some good material for our history of which there is already a wonderful scarcity.”²⁷⁴

h. Carlo Botta's History

It was another Italian writer and historian, the physician and politician Carlo Botta (1766-1837), also known as Charles Botta, who wrote *History of the War of Independence of the United States of America* (1809), what was called in 1840 “certainly the most classical history of the American Revolution yet written.”²⁷⁵ “CARLO BOTTA’s excellent work has made our early history familiar to the educated Italian mind,” *The New York Times* reported.²⁷⁶ Botta studied medicine at the University of Turin; wrote books on the history of Italian states and American independence; and got his multi-volume history of the American Revolution published in Paris. Botta had taken refuge in France in 1795 after

²⁷⁴ HOWARD R. MARRARO, ED., PHILIP MAZZEI, VIRGINIA’S AGENT IN EUROPE: THE STORY OF HIS MISSION AS RELATED IN HIS OWN DISPATCHES AND OTHER DOCUMENTS 14 (New York: The New York Public Library, 1935).

²⁷⁵ “Carlo Botta,” BOSTON POST (Boston, MA), July 3, 1840, p. 2; 2 CHARLES BOTTA, HISTORY OF THE WAR OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA (George Alexander Otis, trans., New Haven: Nathan Whiting, 8th ed. 1834). Imprisoned at the age of twenty-three by the Government of Piedmont “for his attachment to republicanism,” Carlo Botta was, “at a later age, suspended from office by Bonaparte for fearlessly denouncing his usurpation.” He ultimately died in poverty in Paris in 1837. “His American Revolution,” the *Boston Post* emphasized three years after Botta’s death, referring to Botta’s 1809 history of the American Revolution, “was first suggested by circumstances which took place at a brilliant dinner party in Paris, at the house of Madame Beccaria.” “Carlo Botta,” Boston Port (Boston, MA), July 3, 1840, p. 2; “Carlo Botta,” Public Ledger (Philadelphia, PA), July 7, 1840, p. 1. The daughter of Cesare Beccaria, Giulia Beccaria—also known as “Madame Beccaria”—had come to Paris and, thanks in part to her famous father’s reputation, had become a high-society hostess. BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 71-72.

²⁷⁶ THE NEW YORK TIMES, Oct. 20, 1867, p. 1; *see also* THE TIMES-PICAYUNE (New Orleans, LA), Oct. 2, 1875, p. 4 (“Many of our readers may remember that Carlo Botta, an ardent worshipper of freedom and a no less enthusiastic admirer of our forefathers, wrote, in Italian, a history of our Revolutionary struggle, creditably translated into English”); THE HOLTON RECORDER (Holton, KS), Oct. 7, 1875, p. 3 (“The remains of the Italian historian, Carlo Botta, well known as the author of a history of the United States, are to be removed from France for burial in the Church of Sante Croce, at Florence.”).

being imprisoned by the king of Sardinia for having revolutionary sympathies. He was made a naturalized French citizen in 1815, but Jefferson wrote to Botta from Monticello in 1810 in anticipation of Botta's history which Jefferson wrote "is not yet come to hand." Botta's book—sent to Madison and Jefferson in 1810 by Botta—was translated from the Italian into English by George Alexander Otis, a well-known resident of Boston, Massachusetts. Botta's history remained incredibly popular in America, going through several editions. It was, for example, labeled a "highly esteemed Work" by an early American newspaper. Otis—one source reports—"is remembered especially on account of his translation of Botta's *History of the War of the Independence of the United States of America*, published in 1820, an undertaking in which he was encouraged by James Madison and John Quincy Adams, and which he accomplished so well that the book ran through twelve editions."²⁷⁷

The Founding Fathers themselves greatly admired Botta's history of the American Revolution, even though it had been written from afar. In 1820, Thomas Jefferson—who possessed a copy of the original edition—wrote of the book and its original author: "I am glad to find that the excellent history of Botta is, at length, translated. The merit of this work has been too long unknown with us. He has had the faculty of sifting the truth of facts from our own histories with great judgment, of suppressing details which do not make part of the general

²⁷⁷ I. Minis Hays, ed., 82 *THE AMERICAN JOURNAL OF THE MEDICAL SCIENCES* 278 (Philadelphia: Henry C. Lea's Son & Co., 1881); To James Madison from Carlo Giuseppe Guglielmo Botta, 12 Jan. 1810 (Abstract); David Bailie Warden to Thomas Jefferson, Jan. 19, 1810; David Bailie Warden to James Madison, Jan. 26, 1810; Thomas Jefferson to Carlo Botta, July 15, 1810; Thomas Jefferson to John R. Fenwick, Sept. 18, 1810, *available at* wwwFOUNDERS.archives.gov.

history, and of enlivening the whole with the constant glow of his holy enthusiasm for the liberty and independence of nations.” Jefferson, who corresponded with Botta and Botta’s English translator, praised Botta for being “neutral, as an historian should be, in the relation of facts,” but as “never neutral in his feelings, nor in a warm expression of them . . . and of honest sympathies with . . . the better cause.” John Adams and James Madison also wrote letters of approval about the book, and Thomas Jefferson sent the first two volumes of Botta’s book—along with Tucker’s *Blackstone*—to Louis H. Girardin after the British, during the War of 1812, burned the U.S. Capitol. “Who has not read ‘Otis’s Botta?’” the *Boston Port* asked in 1840.²⁷⁸

That an Italian writer would get such respect—and would get translated into English—shows the affinity that Americans had for Italian authors. As one source describes the respect Botta’s book got: “John Adams called Botta the best, and Jefferson predicted it would become ‘the common manual of our

²⁷⁸ ARTHUR H. SHAFFER, *THE POLITICS OF HISTORY: WRITING THE HISTORY OF THE AMERICAN REVOLUTION, 1783-1815*, at 35 (Piscataway, NJ: Transaction Publishers, 2009); Thomas Jefferson to Louis H. Girardin, Aug. 28, 1814, *available at* wwwFOUNDERS.archives.gov; NEWBERN SPECTATOR (Newbern, NC: Aug. 16, 1828), p. 3; “Carlo Botta,” BOSTON PORT (Boston, MA), July 3, 1840, p. 2; “New Books,” THE EVENING POST (New York, NY), July 20, 1820, p. 4; *see also* “Botta’s,” THE EVENING POST (New York, NY), July 28, 1820, p. 2; Kotzebue’s Narrative,” THE EVENING POST (New York, NY), p. 3; “Botta’s American Revolution,” GETTYSBURG COMPILER (Gettysburg, PA), Aug. 2, 1820, p. 1; “New England Journal,” THE EVENING POST, Aug. 22, 1820, p. 1; RALEIGH REGISTER AND NORTH-CAROLINA GAZETTE (Raleigh, NC), Sept. 7, 1821, p. 4; “Public Sale of Law Books,” THE EVENING POST (New York, NY), Dec. 7, 1827, p. 3; “Valuable Private Library,” BOSTON PORT (Boston, MA), Aug. 17, 1832, p. 3 (listing “Otis’s Botta” for auction “at Cunningham’s Auction Room” from “[t]he Library of the late THOS. B. ADAMS, Esq.”); 2 CHARLES BOTTA, *HISTORY OF THE WAR OF THE INDEPENDENCE OF THE UNITED STATES* 58-59 (Cooperstown, NY: H. & E. Phinney, George Alexander Otis, trans., 9th ed. 1845).

Revolutionary History.”²⁷⁹ John Adams wrote to Thomas Jefferson in 1815, calling Botta’s book an “Italian Classick”; Jefferson wrote back to say that while “Botta, as you observe, has put his own speculations and reasonings into the mouths of persons whom he names, but who, you & I know, never made such speeches,” Botta had simply “followed the example of the antients, who made their great men deliver long speeches” and that “the work is nevertheless a good one.” Both Botta’s book and Beccaria’s treatise were, tellingly, found in early catalogues at the U.S. Military Academy at West Point.²⁸⁰

i. Beccaria’s American Disciples

Even in the very midst of the Revolutionary War, which ended with the Treaty of Paris in 1783, Beccaria’s guidance can be felt. In 1776, the same year the Second Continental Congress issued its Declaration of Independence, Edmund Pendleton—a prominent Virginia lawyer and politician—wrote to Thomas Jefferson: “Our Criminal System of Law has hitherto been too Sanguinary, punishing too many crimes with death, I confess.”²⁸¹ In fact, as America’s first commander-in-chief, then-General George Washington—having endured the bitter winter of 1777-1778 with his troops at Pennsylvania’s Valley Forge—wrote

²⁷⁹ DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 368 (New York: Vintage Books, 2010); id. (“It was a woman, Mercy Otis Warren (sister of James Otis and friend of Abigail Adams), who wrote the first substantial and comprehensive history of the Revolution by an American hand (3 vols. 1805). Significantly, it was not an American but an Italian, Charles Botta, whose *History of the War of Independence* (first published in Italian, 1809; translated into English, 1820) became the first standard account for Americans of all parties.”).

²⁸⁰ CATALOGUE OF THE LIBRARY OF THE U.S. MILITARY ACADEMY, WEST POINT, NY 50, 123, 273 (New York: John F. Trow, 1853); John Adams to Thomas Jefferson, July 30, 1815; Thomas Jefferson to John Adams, Aug. 10, 1815, *available at* wwwFOUNDERS.archives.gov.

²⁸¹ BESSLER, *CRUEL AND UNUSUAL*, *supra* note 66, at 141.

in 1778 to the Continental Congress: “Capital crimes in the army are frequent, particularly in the instance of desertion; actually to inflict capital punishment upon every deserter or other heinous offender, would incur the imputation of cruelty, and by the familiarity of the example, destroy its efficacy; on the other hand to give only a hundred lashes to such criminals is a burlesque on their crimes rather than a serious correction, and affords encouragement to obstinacy and imitation.”²⁸² Despite having once served as a British officer and been trained to use corporal punishments and executions to maintain military discipline, Washington came to view executions—even in wartime—as too common, instead seeking the option, at least for some crimes, of an intermediate punishment, something less than death though more than 100 lashes.²⁸³

General Charles Lee, one of Washington’s subordinates in the Revolutionary War, would have gone even further, writing: “With respect to criminal matters, I would adopt Beccaria’s scheme; its excellencies have been demonstrated in the Tuscan dominions.” Lee noted that the Grand Duke of Tuscany “had read and admired the Marquis of Beccaria,”²⁸⁴ and “put a stop to all

²⁸² Id. at 130.

²⁸³ Id. at 130-31.

²⁸⁴ JOHN S. DOSKEY, ED., *THE EUROPEAN JOURNALS OF WILLIAM MACLURE* 474 (Philadelphia: American Philosophical Society, 1988) (“*Grand Duke Leopold* (1747-1792) ruled Tuscany between 1765 and 1790, and gave the former Medici territory ‘perhaps the best government in Europe.’ Although he was only eighteen years of age when he came to power, he gathered about him mature and respected Italians such as Cesare Beccaria (1738-1794), who were familiar with the people, their needs, and the possibilities of the duchy.”). When Leopold, the Grand Duke of Tuscany and, later, the Emperor of Germany, died, it was also reported then that he had been influenced by Beccaria. “Emperor of Germany,” *THE WATERFORD HERALD* (Waterford, Ireland), Mar. 27, 1792, p. 2 (“His Government was that of a philosophic Prince, who wished to secure the affections of his subjects by promoting their happiness.”); id. (“Disgusted with the multiplicity of the penal statutes, which afforded so many pretences to a tyrannical sovereign, to disgrace, punish, and even cut off the most virtuous citizens, he formed and

capital punishments, even for the greatest crimes; and the consequences have convinced the world of its wholesomeness.” “The galleys, slavery for a certain term of years, or for life, in proportion to the crime,” Lee wrote, “have accomplished what an army of hangmen, with their hooks, wheels and gibbets, could not.” Praising Beccaria’s book as an “incomparable treatise,” General Lee emphasized: “In short, Tuscany, from being a theatre of the greatest crimes and villanies of every species, is become the safest and best ordered State of Europe.” “I am therefore,” Lee concluded, “absolutely and totally against capital punishments, at least in our military community.” With non-lethal corporal punishments, such as branding and whipping, then still in use, Lee offered this suggestion: “As to those who have been guilty of crimes of a very deep dye, such as wanton murder, perjury, and the like, let them be mutilated, their ears cut off, their faces stamped with the marks of infamy, and whipped out of State.” “Let the loss of liberty, and ignominy,” Lee explained elsewhere, “be inculcated as the extreme of all punishments: common culprits therefore are, in proportion to the degree of their delinquency, to be condemned to slavery, for a longer or shorter

introduced a Criminal Code, no less celebrated for its justice than its humanity.”); *id.* (“Beccaria, who had already distinguished himself by his celebrated treatise on crimes and punishments, was consulted and cherished by him. He drew that great man from the seclusion of private life, and enabled him to convert his theory into practice, by placing him at the head of one of the tribunals of justice.”); *see also* “To the Legislatures of the Respective States,” *RALEIGH REGISTER AND NORTH-CAROLINA STATE GAZETTE* (Raleigh, NC), Oct. 1, 1804, p. 1 (noting that the Grand Duke of Tuscany had “read and admired the marquis of Beccaria, and determined to try the effect of his plan”). During the 1790s, Beccaria’s treatise continued to be cited and discussed throughout the world. Often, Beccaria’s name was spoken of with great praise, including in English-speaking countries. *E.g.*, “For the Northern Star,” *THE NORTHERN STAR* (Belfast, Northern Ireland), Apr. 18, 1792, p. 4 (“[t]he enlightened and amiable Beccaria”); *see also* *RALEIGH REGISTER AND NORTH-CAROLINA STATE GAZETTE* (Raleigh, NC), Feb. 9, 1807, p. 2 (“the learned and benevolent Beccaria”); *THE ADAMS SENTINEL* (Gettysburg, PA), Apr. 22, 1807, p. 3 (“the enlightened and humane Beccaria”).

term of years; to public works, such as repairing high ways, and public buildings, with some ignominious distinction of habit, denoting their condition.”²⁸⁵

By the 1780s and 1790s, American lawmakers were making strenuous efforts to put Beccaria’s theoretical ideas into practice. In 1785, following the end of the Revolutionary War, Thomas Jefferson’s bill to make punishments more proportionate to crimes finally came to a vote in the Virginia legislature.²⁸⁶ After it failed to pass by a single vote, James Madison—who pushed for the bill’s adoption in Jefferson’s absence due to his friend’s diplomatic responsibilities abroad—woefully lamented to Jefferson that “our old bloody code is by this event fully restored.”²⁸⁷ Efforts in Pennsylvania, where the anti-gallows movement had deeper roots, stretching back to the days of Quaker William Penn, were successful sooner.²⁸⁸ In 1786, the same year the death penalty was totally abolished in Tuscany, Pennsylvania abolished the death penalty for robbery, burglary and sodomy.²⁸⁹ Ten years later, in 1796, New York and New Jersey also voted to reduce the number of capital crimes, with Virginia—in an effort led by George Keith Taylor, John Marshall’s brother-in-law—finally doing the same that year, too.²⁹⁰ “Even Congress, in one of the first attempts to create a national penal

²⁸⁵ EDWARD LANGWORTHY, ED., *MEMOIRS OF THE LIFE OF THE LATE CHARLES LEE*, *ESQ.* 76-77, 80, 82 (London: J. S. Jordan, 1792).

²⁸⁶ BESSLER, *CRUEL AND UNUSUAL*, *supra* note 66, at 157.

²⁸⁷ *Id.*

²⁸⁸ TODD R. CLEAR, GEORGE F. COLE & MICHAEL D. REISIG, *AMERICAN CORRECTIONS* 44 (Belmont, CA: Wadsworth, 10th ed., 2013).

²⁸⁹ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 281 (New York: Simon & Schuster, 1985).

²⁹⁰ NORVAL MORRIS & DAVID J. ROTHMAN, EDs., *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 103 (Oxford: Oxford University Press, 1995); DOUGLAS BRADBURN, *THE CITIZENSHIP REVOLUTION: POLITICS & THE CREATION OF THE AMERICAN UNION 1774-1804*, at 196 (Charlottesville: University of Virginia Press, 2009).

law,” writes historian Louis Masur in *Rites of Execution*, “appointed a committee to investigate alterations in the penal laws of the United States that would provide ‘milder punishments for certain crimes for which infamous and capital punishments are now inflicted.’”²⁹¹

The creation of that committee was urged by Edward Livingston, a 1781 graduate of Princeton College and the youngest of eleven children of Robert Livingston, a judge of New York’s Supreme Court. Edward’s oldest brother, Robert R. Livingston, had been a member of the committee of five tasked with framing the Declaration of Independence. Among the signers of that historic document: Philip Livingston, a cousin of Edward’s father. In 1801, Thomas Jefferson would appoint Edward Livingston—who, years later, wrote a draft penal code for the State of Louisiana advocating the abolition of capital punishment—as U.S. attorney for the district of New York.²⁹² Edward Livingston would later become U.S. Secretary of State in Andrew Jackson’s administration; would speak with Alexis de Tocqueville and Gustave de Beaumont when they toured America to gather information on its penal system; and would be honored—along with Beccaria and Grand Duke Leopold of Tuscany—on a monument erected by the Peace Society of Geneva that was dedicated to those advancing the cause of peace and humanity. “I mingled my square dances and waltzes with most interesting conversations with Mr. Livingston on the penitentiary system and especially on

²⁹¹ MASUR, *rites of execution*, *supra* note 94, at 71.

²⁹² CHARLES RICHMOND HENDERSON, *correction and prevention* 151-51 (New York: Russell Sage Foundation, 1910).

capital punishment, passing thus from the serious to the pleasant,” Beaumont wrote of one memorable evening he passed with the Livingston family.²⁹³

Although Pennsylvanians pushed forward some penal reform in the 1780s, the Commonwealth of Pennsylvania witnessed even more anti-gallows activity in the 1790s. In 1793, William Bradford—Madison’s close friend from their time together at Princeton—wrote *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania*. In that publicly circulated legislative report, Bradford—again invoking Beccaria—argued for the death penalty’s abolition for all crimes except pre-meditated murder. Noting that evidence might later show the death penalty to be unnecessary even for pre-meditated murderers, Bradford wrote that, in America, “as soon as the principles of Beccaria were disseminated, they found a soil that was prepared to receive them.”²⁹⁴

On Crimes and Punishments made an indelible impression. In America, Beccaria’s treatise—at least as regards to the criminal justice system—led citizens to embrace what one writer called “[a] few plain axioms easy of apprehension”: (1) “That the prevention of crimes is the sole end of government”; (2) “That every punishment, which is not absolutely necessary for that purpose, is a cruel and tyrannical act”; and (3) “That every penalty should be apportioned to the offence.” “From these leading principles,” that writer emphasized, “the following inferences have been drawn”: (1) “That the punishment of crimes should be prompt and certain”; (2) “That pardons should be rarely, if ever, interposed”; and

²⁹³ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 383; 1 C. S. HENRY, AMERICAN ADVOCATE OF PEACE 82-83 (Hartford, CT: William Watson, 1834) (for the Connecticut Peace Society).

²⁹⁴ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 85-91.

(3) “That, in order to insure a certainty of punishment and to avoid the necessity of pardons, punishments should rather be too light than too severe.” “Facts have shewn that under a code of laws, founded on this principles,” the writer concluded, “crimes have been few; while under a sanguinary system, they have invariably become more numerous and atrocious.” The “plain axioms,” derived in large measure from Beccaria’s treatise, were said to “have been universally received.”²⁹⁵

With its Quaker influence, Pennsylvanians led the way on penal reform. In 1794, Pennsylvania ultimately became the first state to divide murder into degrees, with only first-degree murder punishable by death.²⁹⁶ But *On Crimes and Punishments* influenced the founding generation long before the 1790s. Beccaria’s writings, notes one criminologist, influenced “reformers such as John Howard and Thomas Jefferson, as well as Quaker reformers in Pennsylvania, and became a driving force behind penal reform in the United States.”²⁹⁷ For example, in a 1776 letter to Edmund Pendleton, Thomas Jefferson’s embrace of Beccarian values is clear. As Jefferson, involved in the revisal of Virginia’s criminal laws, wrote on August 26, 1776: “It is only the sanguinary hue of our penal laws which I meant to object to. Punishments I know are necessary, and I

²⁹⁵ “To the Legislatures of the Respective States,” RALEIGH REGISTER AND NORTH-CAROLINA STATE GAZETTE (Raleigh, NC), Oct. 1, 1804, p. 1 (“From the National Intelligencer”). Similar principles were also adopted elsewhere. “A Declaration of Rights, by the People of Venezuela,” EDENTON GAZETTE (Edenton, NC), Sept. 17, 1811, p. 1 (listing the following under “*Rights of Man in Society*”: “17. The law shall not decree any punishment not absolutely necessary; and that shall be proportionate to the crime, and useful to society.”).

²⁹⁶ GUYORA BINDER, *FELONY MURDER* 128 (Stanford, CA: Stanford University Press, 2012).

²⁹⁷ MITCHEL P. ROTH, *PRISONS AND PRISON SYSTEMS: A GLOBAL ENCYCLOPEDIA* 29 (Westport, CT: Greenwood Press, 2006).

would provide them, strict and inflexible, but proportioned to the crime.” As Jefferson added, using language that could have come straight from Beccaria’s mouth: “Laws thus proportionate and mild should never be dispensed with. Let mercy be the character of the law-giver, but let the judge be a mere machine.”²⁹⁸

In the late eighteenth century, American leaders invoked Beccaria’s name and expressed reservations about executions or their frequency.²⁹⁹ In 1791, James Wilson—then an Associate Justice of the U.S. Supreme Court—instructed a Virginia grand jury as follows: “Let the punishment be proportioned—let it be analogous—to the crime.” Wilson—a well-known lawyer who played a significant role at the Constitutional Convention in 1787—also recited Beccaria’s words in another grand jury charge, delivered in 1793, in Boston, Massachusetts. As Wilson told one set of grand jurors, a body empanelled to check abusive governmental power: “‘How happy would mankind be,’ says the eloquent and benevolent Beccaria, ‘if laws were now to be first formed!’ The United States enjoy this singular happiness. Their laws are now first formed.” Noting that England’s Bloody Code, as Blackstone put it, made “no fewer than one hundred and sixty actions” punishable by death, Wilson added that “sanguinary laws” are “a political distemper of the most inveterate and the most dangerous kind.” One of only six men to sign both the Declaration of Independence and the U.S. Constitution, Wilson would advise that “the people are corrupted” by sanguinary laws and that “[i]t is on the excellence of the criminal laws, says the celebrated Montesquieu, that the liberty of the citizens principally depends.” As Wilson,

²⁹⁸ Thomas Jefferson to Edmund Pendleton, Aug. 26, 1776.

²⁹⁹ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 47-55.

whose mind was described by Dr. Benjamin Rush as “one blaze of light,” proudly proclaimed in instructing grand jurors: “How few are the crimes—how few are the capital crimes, known to the laws of the United States, compared with those known to the laws of England!”³⁰⁰

Many early American lawmakers did not fully embrace—or at least did not try to fully implement—Beccaria’s criminal law theories. Beccaria’s ideas were novel, and the Founding Fathers came of age at a time before the development of penitentiaries. For many lawmakers, the notion of abandoning executions altogether was seen as a step too far. Executions were still a well-entrenched part of the English common-law tradition—and therefore the colonial criminal justice system. Many early U.S. lawmakers thus insisted that the death penalty be retained for the most serious offenses (*e.g.*, first-degree murder and treason). The Crimes Act of 1790, the U.S. Government’s first legislation to criminalize behavior, made treason, murder, piracy and counterfeiting punishable by death, with “hanging the person convicted by the neck until dead” listed as the mode of execution. That act also authorized the use of public whipping and the pillory.³⁰¹ Putting Beccaria’s theories into practice proved to be a struggle, especially with some early American lawmakers who either approached the untested theories with trepidation or who took a different view of what punishments were “necessary.”

³⁰⁰ Id. at 52; 2 MAEVA MARCUS, ED., *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800: THE JUSTICES ON CIRCUIT, 1790-1794*, at 189-90, 402 (New York: Columbia University Press, 1988); ROBERT AITKEN & MARILYN AITKEN, *LAW MAKERS, LAW BREAKERS AND UNCOMMON TRIALS* 15 (Chicago, IL: American Bar Association, 2007).

³⁰¹ An Act for the Punishment of Certain Crimes Against the United States §§ 1, 2, 9, 14, 16, 18, 32, 33 (Apr. 30, 1790).

j. *The Science of Legislation*

Many Americans, persuaded by the writings of Cesare Beccaria or his fellow Italian, Gaetano Filangieri, nevertheless fought to curtail executions, if not eliminate them. A youthful Italian writer from Naples, Gaetano Filangieri wrote a popular treatise, *The Science of Legislation*.³⁰² The treatises of Beccaria and Filangieri were both highly valued, first gaining attention in Europe before gaining popularity in America. And taken together, they made an especially noteworthy impact, though Beccaria's treatise came much earlier. During the Enlightenment—as one *Harvard Law Review* article put it—“at least two Italian jurists achieved European pre-eminence: Beccaria and Filangieri.” As Morris R. Cohen wrote in that 1946 article: “The civilized world was profoundly stirred by the small but weighty book of Beccaria, *Dei Delitti e delle Pene*, in which the whole philosophy of the Enlightenment found a notable humanitarian application. The contemporary French, English, and other translations of the youthful Filangieri's *Scienze de Ligislazioni* show how his generalization of Beccaria's legal humanism impressed the European mind.”³⁰³

Beccaria's humanism penetrated the American mind, too, with Filangieri—who rose to prominence after the public's embrace of Beccaria's ideas had already occurred—corresponding with Benjamin Franklin in a pen-pal

³⁰² E.g., JOHANN WOLFGANG GOETHE, *WILHELM MEISTER'S TRAVELS* 62 (London: George Bell and Sons, Edward Bell, ed., 1885) (referring to “the time of Beccaria and Filangieri” and “the renowned author of ‘La Scienza della Legislazione’”).

³⁰³ Morris R. Cohen, *Italian Contributions to the Philosophy of Law*, 59 *HARV. L. REV.* 577, 578 (1946).

relationship.³⁰⁴ Filangieri—who is known to have had lively discussions about Beccaria and Montesquieu in Naples with Johann Wolfgang von Goethe in March 1787³⁰⁵—advocated for the death penalty’s retention for murder and treason but sought its abandonment for lesser crimes. Dr. Franklin embraced that general approach, seeing executions for lower-level offenders, such as thieves, as unjust and unwarranted.³⁰⁶ Filangieri himself wrote about the concept of proportionality, putting it this way in *The Science of Legislation*: “The proportion between the penalty and the quality of the offence is determined by the influence that the violation of the pact has on the social order.”³⁰⁷ There were, in this era, a number

³⁰⁴ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 134-36. Benjamin Franklin also corresponded with other Italians, including Father Giovanni Battiste Beccaria, a scientist in Turin who studied and wrote about electricity, and Vincenzo Martinelli, an historian and adventurer. Vincenzo Martinelli to Benjamin Franklin, Sept. 25, 1779; Vincenzo Martinelli to Benjamin Franklin, Apr. 10, 1781, *available at* wwwFOUNDERS.archives.gov; 3 DAVID BREWSTER, *THE EDINBURGH ENCYCLOPEDIA* 373-74 (Philadelphia, PA: Joseph and Edward Parker, 1st Am. ed. 1832) (“Beccaria formed a correspondence with Dr Franklin, to whom he inscribed one of his works; and he even made a translation of Franklin’s treatise on *The Increase of Mankind*, and the *Population of Countries*, from English into Italian, which yet remains in manuscript. Franklin entertained a high esteem for Beccaria, and dedicated to him a new invented instrument, consisting of a combination of musical glasses, which he called *Harmonica*.”); 6 WILLIAM TEMPLE FRANKLIN, ED., *THE WORKS OF DR. BENJAMIN FRANKLIN IN PHILOSOPHY, POLITICS, AND MORALS* 92-93 (Philadelphia: William Duane, 1817) (reprinting the text of one of Benjamin Franklin’s letters to Father Beccaria).

³⁰⁵ JOHANN WOLFGANG VON GOETHE, *GOETHE’S WORKS: THE POEMS OF GOETHE* 239 (New York: John D. Williams, 1882) (noting Filangieri’s meeting with Goethe on March 5, 1787, in this letter written by Goethe: “[H]e was delighted to speak of Montesquieu, Beccaria, and of some of his own writings,—all in the same spirit of the best intention, and of a heart full of youthful enthusiasm of doing good.”).

³⁰⁶ *Id.* at 217-18.

³⁰⁷ Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2424 n.129 (1997) (quoting 4 GAETANO FILANGIERI, *LA SCIENCE DE LA LEGISLATION* 214 (J.A. Gauvin Gallois trans., Chez Cuchet 1784)); *see also* “Gaetano Filangieri and Benjamin Franklin: The Relationship Between the Italian Enlightenment and the U.S. Constitution,” p. 72, *available at* http://sedi2.esteri.it/sitiweb/AmbWashington/Pubblicazioni/2_filangieri_interno.pdf (summarizing Filangieri’s views on the criminal law and noting that he supported “the introduction of punishments more moderate and proportionate to the seriousness of the

of writers who had been critical of the existing state of the law, and especially the criminal law.³⁰⁸ Sadly, Filangieri died at the age of thirty-six in 1788, his envisioned project of a seven-volume treatise unfulfilled. His fifth volume was published posthumously.³⁰⁹

But before dying, Filangieri left of decent-sized body of work, and it was clear in the Enlightenment era that Italian lawyers—like American lawyers—were desperately searching for new approaches to the law and to crime and punishment in particular. In the case of Filangieri, his own articulated goal—“a complete and rational system of Legislation”—was clear. “It is remarkable, that among so many Writers who have given themselves up to the study of law,” Filangieri lamented, “some have treated the subject merely as Lawyers, some as Philologists, some again as Politicians.” “Some, like Montesquieu,” Filangieri groused, “have reasoned rather on what *has been* done than on what *ought* to be done: but not one has yet given us a complete and rational system of Legislation; not one has yet reduced this subject to a certain and regular science, uniting

crime” and that, as regards the death penalty, “it is only necessary to punish a voluntary and premeditated murder” and “treason and the conspiracy against the state”).

³⁰⁸ As one scholar puts it:

Among those who best represent the move for both political and Criminal law reform at the time were Cesare Beccaria (1738-1794), Gaetano Filangieri (1752-1788), Gian Domenico Romagnosi (1761-1834) and Paul J.A. Feuerbach (1775-1833). Only Feuerbach and Filangieri can be considered true experts in Criminal law, the other two were enlightened authors that vehemently criticized the existing system of Criminal law. Before them, Voltaire, Montesquieu, Grotius, Hobbes, Pufendorf and Locke had all been critical of their respective legal systems. The most well-known Spanish figure was Manuel de Lardizabal.

Aniceto Masferrer, *The Liberal State and Criminal Law Reform in Spain*, 3 IUS GENTIUM 19, 27 (2010).

³⁰⁹ 3 DAVID S. CLARK, ED., *ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 585 (Thousand Oaks, CA: Sage Publications, 2007).

means to rules, and theory to practice.” “This I undertake to do, in the following work, intitled *The Science of Legislation*,” Filangieri pledged. Though Filangieri still made reference to the “immortal Montesquieu,” the traditional homage, Filangieri—at the outset of his ambitious project—thus promised a comprehensive, seven-volume work to systematically address these topics: (1) “*general rules of the legislative science*”; (2) “*laws political and æconomical*”; (3) “*criminal laws*”; (4) “*education, manners, and public instructions*”; (5) “*laws which respect religion*”; (6) “*those respecting property*”; and (7) laws “*which relate to paternal authority, and the good order of families.*”³¹⁰

Filangieri’s first translated volume laid out his future agenda. On the subject of criminal law, Filangieri identified “*security*” and “*tranquility*” as “the scope of Criminal Laws.” In laying out his goals for his third book, on the criminal law, the 1791 translation of Filangieri’s initial volume of *The Science of Legislation* offered these words (in the pre-volume three time frame) from the Italian lawyer:

We shall then examine in what manner the law must find punishments adapted to the nature of every species of crime; and how proportion them to the degree of guilt; in what manner legal sanction should distinguish the person of the delinquent, the circumstances of the crime, the facility of commission, the injury which the greater or less hopes of impunity inspired by this facility may occasion, and the great or less instigation the citizen may have

³¹⁰ GAETANO FILANGIERI, AN ANALYSIS OF THE SCIENCE OF LEGISLATION, FROM THE ITALIAN OF THE CHEVALIER FILANGIERI 16-18 (London: G. G. J. & J. Robinson, William Kendall, trans., 1791). Filangieri distinguished himself from Montesquieu in this way: “Montesquieu seeks in these relations the *spirit* of laws, and *I* seek the *rules*. *He* attempts to find in them reasons for what has been done, and *I* attempt from the same source to deduce rules for what ought to be done.” *Id.* at 23. But Filangieri also complimented Montesquieu, writing: “I cannot however omit confessing how much I owe to the labours of this great man. It is a tribute of gratitude which I offer to one who has thought before me, and by his very errors has instructed me to gain the paths of truth.” *Id.* at 23-24.

to commit it; how, when, and with what moderation, the Legislator should avail himself of capital punishments . . . and whether the *certainty* of a moderate punishment would not have a stronger tendency to deter men from the commission of crimes than the fear of one far more severe, when that fear is accompanied with the hope of remaining unpunished.³¹¹

Filangieri did not cite Beccaria's work in this recitation of the goals of his third volume, but it is plain to see Beccaria's influence nonetheless. Giacinto Dragonetti—another Italian writer, and one avidly consulted and quoted by the American revolutionary Thomas Paine—wrote the inverse of *On Crimes and Punishments*. Instead of addressing delinquent behavior, the subject Beccaria took up, Dragonetti titled his work *A Treatise on Virtues and Rewards* (1769).³¹² Whereas Beccaria focused on how to deter criminal behavior and how to punish criminal activity, Dragonetti was more interested in how to incentivize virtuous behavior. Paine—who, with Benjamin Franklin's assistance, had emigrated to America from England in 1774³¹³—would draw inspiration from Dragonetti's book as he wrote his own runaway bestseller, *Common Sense* (1776). In fact, when Dragonetti's treatise was translated into English, the preface to the translation boasted that when it first appeared in Naples, it “received an applause

³¹¹ Id. at 37, 40-43.

³¹² BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 79. The Enlightenment, in general, was focused on how best to maximize virtue and people's happiness. *See, e.g.*, WILLIAM NETTLESON, A TREATISE ON VIRTUE AND HAPPINESS 12 (Glasgow: Robert Urie, 6th ed. 1751) (“PLEASURE is called good, and pain evil”); id. at 16 (“The prospect of being happy in the time to come, gives us present delight; as the view of any future misery necessarily occasions immediate disturbance.”).

³¹³ JOYCE E. CHAPLIN, THE FIRST SCIENTIFIC AMERICAN: BENJAMIN FRANKLIN AND THE PURSUIT OF GENIUS 245 (New York: Basic Books, 2006).

little inferior to that which had celebrated the name of Beccaria.”³¹⁴ In *The Science of Legislation*, Filangieri himself later noted the importance of “education, manners, and public instruction,” emphasizing: “Though penal Laws may prevent crimes by terrifying the citizen with threats of punishment, they can be of no avail to the encouragement of virtue.” “Fear then,” Filangieri wrote, “may diminish the number of delinquents; but can never give birth to heroes.”³¹⁵

k. Benjamin Franklin and Gaetano Filangieri

Gaetano Filangieri had a special relationship with Benjamin Franklin. The son of a noble Neapolitan family, Filangieri published the first two volumes of his *Scienza della Legislazione*—a much talked about title in Europe that came to Franklin’s attention—while serving in the military. The fifteenth child of a poor family, Franklin had been a printer, a journalist and an editor, and he had also become a famed author and scientist and diplomat before he commenced his correspondence with Filangieri. Filangieri had gotten positive responses from Pietro Verri and Cesare Beccaria for the first two volumes of *Scienza della Legislazione*, and while Franklin was serving in Paris as the American minister to Louis XVI’s court, he, too, became aware of Filangieri’s work in 1781 through Luigi Pio. A Neapolitan diplomat in Paris, Pio corresponded with Filangieri and had distributed the first two volumes of Filangieri’s *Scienza della Legislazione* to French *philosophes* such as D’Alembert and Diderot. Franklin, Pio’s friend, expressed the desire to read Filangieri’s books, and Pio—anxious to promote

³¹⁴ ALDRIDGE, THOMAS PAINE’S AMERICAN IDEOLOGY, *supra* note 248, at 71; LUIGINO BRUNI, THE GENESIS AND ETHOS OF THE MARKET 136-37 (New York: Palgrave Macmillan, 2012).

³¹⁵ FILANGIERI, *supra* note 310, at 43.

Filangieri's work—gave them to Franklin. Pio then dutifully reported back to Filangieri of Franklin:

He hardly reads Italian, but he can understand it well and he has already told me that he has started enjoying your theories which are exposed 'clearly and precisely'. These are his words. He asks me to tell you he is looking forward for the book that will expose criminal legislation, because this will be more useful for his Nation, which now still needs to make this subject clearer.

A few days later, on September 23, 1781, Pio sent Filangieri another letter. Pio had forgotten to tell Filangieri that Franklin had given one of his political essays to Pio to give to Filangieri. "I have already sent it by boat," Pio reported to Filangieri, noting, "On the same book you will find the handwriting of the American philosopher who dedicates it to you."³¹⁶

In 1782, Filangieri thanked Franklin for "your precious gift" and decided to reciprocate by sending to Paris some copies of the first two volumes of *Scienza della Legislazione*. Filangieri also wrote to say that the third book, on the criminal law, would be forthcoming soon. That book would be composed of two volumes: one on criminal procedure and one on the criminal law. Because he was ill, Franklin did not immediately respond to Filangieri's letter, which sought Franklin's comments on his work. After both Pio and Filangieri wrote additional letters to Franklin in mid-November and early December of 1782, however, Franklin did get back to Filangieri. In his letter to Franklin of December 2, 1782,

³¹⁶ "Gaetano Filangieri and Benjamin Franklin: The Relationship Between the Italian Enlightenment and the U.S. Constitution," pp. 15-22, *available at* http://sedi2.esteri.it/sitiweb/AmbWashington/Pubblicazioni/2_filangieri_interno.pdf (noting the research project was directed by Counselor Giannicola Sinisi with research done by Dr. Monica D'Agostini with assistance from the Library of Congress, the American Philosophical Society of Philadelphia and the Museo Civico Gaetano Filangieri in Naples).

Filangieri had complained of financial difficulties and limited resources that posed an obstacle to his marrying Charlotte Frendel, a “lady-in-waiting” to the queen. In his letter, Filangieri had also expressed his secret desire to move to Philadelphia—a city Filangieri said he’d been “attracted to” since childhood.³¹⁷ “Dear and respectable Franklin, who more than you could make this enterprise easier!” Filangieri wrote, adding: “Couldn’t my works on legislation persuade you to invite me to participate to the great Code, which is going to be prepared in the United Provinces of America, whose laws will decide their destiny and not only, but also the destiny of this entire Hemisphere?” “I could also first ask the permission of my Court for a brief period of time, in order not to upset it with a permanent resignation; but once I will be in America, who could bring me back to Europe!” Filangieri wrote hopefully.

Benjamin Franklin’s reply, dated January 11, 1783, showed continued interest in Filangieri’s forthcoming work on the criminal law. But it cautioned Filangieri about the expense and risks of relocating to distant America while simultaneously promoting the idea of Filangieri attempting to obtain a ministry in America to facilitate and build commercial ties between Naples and America.³¹⁸ “The letter you did me the honour of writing to me in August last came to my hands when I lay ill of two painful disorders, which confined me near three months, and with the multiplicity of business that followed obliged me to postpone much of my correspondence,” Franklin’s January 11th letter began. “I

³¹⁷ Id. at 74-76, 91-94 (in *The Science of Legislation*, Filangieri wrote about civil liberty, freedom, despotism, and freedom of the press, as well as about Philadelphia and Pennsylvania, describing Benjamin Franklin’s home state as a land of freedom and justice).

³¹⁸ Id. at 22-32.

have yesterday received a second letter from you, and I now, without further delay, sit down to answer them both,” Franklin wrote. “The two first volumes of your excellent work, which were put into my hands by M. Pio, I perused with great pleasure,” Franklin told Filangieri, adding this further compliment to his Italian counterpart: “They are also much esteemed by some very judicious persons to whom I have lent them. I should have been glad of another copy for one of those friends, who is very desirous of procuring it; but I suppose those you mention to have sent to M. Pio did not arrive.”

After writing that he was glad “we may soon expect the satisfaction of seeing the two volumes” on the subject of the criminal laws—a subject Franklin confessed were in “great disorder”—Franklin addressed head-on Filangieri’s idea of immigrating to America. “With regard to your project of removing to America, though I am sure that a person of your knowledge, just sentiments, and useful talents would be a valuable acquisition for our country,” Franklin advised, “I cannot encourage you to undertake hastily such a voyage; because for a man to expatriate himself is a serious business, and should be well considered, especially where the distance is so great and the expense of removing thither with a family, of returning if the country should not suit you, will be so heavy.” As the elder and more experienced Franklin, giving fair forewarning, emphasized: “I have no orders or authority of any kind to encourage strangers with expectations of employment by our government, nor am I empowered to be at any expense in transporting them; though our country is open, and strangers may establish themselves there, where they soon become citizens and are respected according to

their conduct.” “I wish, therefore,” Franklin urged, “you could see that country by yourself before you carry thither the lady with whom you propose to be united in marriage.” “England has now acknowledged our independence, and the sovereignty of our government,” Franklin added, explaining that “several states of Europe who think a commerce with us may be beneficial to them are preparing to send ministers to reside near the Congress.” Franklin saw Filangieri as a fit candidate for such a mission, one that might “establish a profitable trade between the kingdom of Naples and America.”³¹⁹

Filangieri—still in, and writing from, Naples—later sent Franklin the third volume of his *Scienza della Legislazione*, promising to send him the fourth volume as soon as possible. In that letter, Filangieri—the details of his marriage worked out—also told Franklin: “in six days I will marry mademoiselle Frenzel.” “The only situation that could bring me away,” Filangieri added, “could be the ministry of America that you suggested.” “When I will hear that my court decides to send a minister to the United Provinces of America,” Filangieri told Franklin, “I will not neglect to indicate my interest to be nominated to it.” In 1783, Luigi Pio—Filangieri’s and Franklin’s mutual friend—continued his communications with both men, announcing to Franklin the shipment of the third volume of *Scienza della Legislazione* and the forwarding of Filangieri’s letter. Pio’s letter to Franklin also referenced Pio’s friend, Jean Antoine Gauvin Gallois, a pro-American, French Enlightenment philosopher who ended up translating *The Science of Legislation* into French between 1786 and 1791.

³¹⁹ 9 ALBERT HENRY SMYTH, ED., *THE WRITINGS OF BENJAMIN FRANKLIN* 1-3 (New York: The Macmillan Co., 1906).

In the Enlightenment's Republic of Letters, the translation and shipment of books and pamphlets was critical. Texts written in Italian were commonly translated into French, Italian, Spanish, German and English, and—in turn—English writings were translated into foreign languages. To promote America's independence, Benjamin Franklin had translated and published in Philadelphia the constitutions of the thirteen American states. That printed compilation, the French-language *Constitutions des treize États-Unis de l'Amérique*, was translated by Duc de la Rochefoucault and sent to Paris. Per Congress's instructions, Franklin distributed two copies to every foreign ambassador in Paris, one for the ambassador and one for each ambassador's European sovereign. Both Pio and Filangieri, whom Franklin admired, received a copy of this new book, and the French language edition was translated into Italian and published in Naples as *Estratto del nuovo codice delle costituzioni de' tredici stati dell'America settentrionale*.³²⁰

The correspondence between Franklin and Filangieri was an extended one. On October 27, 1783, Filangieri wrote another letter to Franklin in Italian, a translated version of which reads: "I wish to thank you for the honor you do me in sending the code of the American Constitutions, a worthy product of the country, the times, the circumstances, and its authors. I would like to express my

³²⁰ Id. at 31-34, 44, 46-47, 65. A copy of *Constitutions des treize États-Unis de l'Amérique* was in the inventory of books in Filangieri's library at Filangieri's death. But unfortunately, riots in Naples in 1799 led to a fire that—according to Teresa Filangieri, the Italian lawyer's granddaughter—"destroyed a great part of the ancient palace of the Filangieri's family, burned also important manuscripts and letters, and among them were many letters of Franklin, of Beccaria and of many other philosophers and historians of that time." Id. at 48-49. There is some speculation as to what actually happened to Filangieri's copy of *Constitutions des treize États-Unis de l'Amérique*. Id. at 49-51.

respect and admiration by sending you the fourth volume of my Works, which includes the second part of the Criminal Law.” That letter and that volume were transmitted to Franklin via a letter from Luigi Pio dated December 12, 1783. An editorial note in *The Papers of Benjamin Franklin* notes that “Filangieri had sent the third volume in July” and that “[t]he two volumes make up Book III of *La scienza della legislazione*.”³²¹ Filangieri was solicitous of Franklin’s opinions and advice, was fascinated by distant Philadelphia and what was going on there as regards law reform, and—as one scholarly source puts it—“wanted to be part of it personally and with his work.” “This,” that source, a detailed study of Franklin and Filangieri’s shared interests, reports, “is the motivation of Filangieri’s desire to go to America, this Promised Land for the followers of Enlightenment.”³²²

Franklin and Filangieri exchanged other letters, too. One Filangieri letter, dated March 21, 1784, responded to one Franklin had sent about a missing page from the third volume of Filangieri’s book. Filangieri sent the page but asked for its return “so I’m not going to have a useless copy because it missed a paper.” At the request of Franklin, Filangieri also supplied some information about Francesco Antonio Grimaldi, an Alderman of the Royal Navy. Filangieri’s letter

³²¹ Id. at 34-35; 41 ELLEN R. COHN, ED., *THE PAPERS OF BENJAMIN FRANKLIN* 148 & n.3 (New Haven: Yale University Press, 2014); *see also* id. at 373 n.4 (in an editorial note to a December 30, 1783 letter to Benjamin Franklin from Charles-Marquerite-Jean-Baptiste Mercier Dupaty, a former advocate-general in the Parlement of Bordeaux who studied the criminal law, it is noted that Benjamin Franklin received the first volume of Filangieri’s *La scienza della legislazione* “the previous summer”; that [d]uring a trip to Italy in July, 1785, Dupaty was introduced to Filangieri by means of a letter written by the secretary of the queen of Naples”; and that “[i]t characterized the bearer as one of the most esteemed magistrates in France, who greatly admired Filangieri’s work and had often discussed it” with Benjamin Franklin).

³²² “Gaetano Filangieri and Benjamin Franklin: The Relationship Between the Italian Enlightenment and the U.S. Constitution,” pp. 15-22, *available at* http://sedi2.esteri.it/sitiweb/AmbWashington/Pubblicazioni/2_filangieri_interno.pdf.

also expressed disappointment that he (Filangieri) had been unable to meet the general secretary of the King of Sweden during the king's visit to Naples. Another letter from Filangieri to Franklin, dated April 21, 1784, has Filangieri inquiring about whether two cases of the third and fourth volumes of Filangieri's treatise, sent the year before, had arrived in Paris. According to researchers, there is no trace of any contact between Franklin and Filangieri for more than a year thereafter—not until late 1785, when Filangieri sends Franklin the fifth book of his treatise, the part pertaining to laws about education and public schooling. A reference in Filangieri's letter about Franklin's returning home to America, however, suggests that they exchanged some additional correspondence between April 1784 and October 1785.³²³

The last letter from Franklin to Filangieri is dated October 14, 1787, less than a month after the Constitutional Convention in Philadelphia wrapped up its work. Writing from Philadelphia, Franklin—then the President of the Commonwealth of Pennsylvania—wrote to his long-time correspondent, the still youthful Italian lawyer: “Believing it may be a Matter of some Curiosity to you to know what is doing in this Part of the World respecting Legislation, I send you inclos’d a Copy of the new Federal Constitution propos’d by a Convention of the States.” “We are so remote from each other, that it is difficult to keep up a regular Correspondence between us, and it is long since I had the Pleasure of hearing from you,” Franklin wrote, noting that “[s]ome of the Books you sent me did not come to hand.” “[I]f any more Volumes are publish’d of your invaluable Work,” Franklin emphasized, “I shall be glad to have 8 of each sent to me.” “Mr.

³²³ Id. at 37-41.

Grand, my Banker at Paris,” Franklin advised, “will pay the Bookseller’s Bill.” The very same day, Franklin—wanting to spread the word in Italy—also sent a similar letter to Luigi Castiglioni, the botanist from Milan who had only recently left America, with Franklin passing along to Castiglioni “a Copy of the new federal Constitution propos’d by the Convention of all the States lately held in this City.” Sadly, it was Filangieri’s wife, Charlotte Frendel, who had to reply with unwelcome news to Franklin’s letter. Her husband had come down with tuberculosis and died on July 21st, 1788, leaving Frendel—a widow with three young children—as the one to pass along the tragic development to Franklin. Frendel—aware of the importance of her husband’s relationship with Franklin—wanted to honor her husband’s memory. She thus sent Franklin the copies of *The Science of Legislation* that he had requested.³²⁴

Because Benjamin Franklin was a prominent Pennsylvania delegate to the Constitutional Convention, his prior exposure to Filangieri’s ideas is of considerable importance. And when it is taken into consideration that James Wilson, John Dickinson and George Wythe—among many other Constitutional Convention delegates—were avid readers of Beccaria, the impact of the Italian Enlightenment on American law becomes clear. Just as early American lawyers such as Josiah Quincy Jr. and Thomas Jefferson copied passages of *On Crimes*

³²⁴ “Gaetano Filangieri and Benjamin Franklin: The Relationship Between the Italian Enlightenment and the U.S. Constitution,” pp. 41-43, *available at* http://sedi2.esteri.it/sitiweb/AmbWashington/Pubblicazioni/2_filangieri_interno.pdf; 9 ALBERT HENRY SMYTH, ED., *THE WRITINGS OF BENJAMIN FRANKLIN* 618-19 (New York: The Macmillan Co., 1906); John D. Bessler, *The American Enlightenment: Eliminating Capital Punishment in the United States*, in LILL SCHERDIN, ED., *CAPITAL PUNISHMENT: A HAZARD TO A SUSTAINABLE CRIMINAL JUSTICE SYSTEM?* 99 (Surrey, England: Ashgate Publishing, 2014).

and Punishments into their commonplace books, Franklin himself underlined and highlighted passages of *The Science of Legislation*—the multi-volume treatise that itself built upon the philosophies of Montesquieu, Beccaria, Blackstone and de Lolme. For example, in his copy of Filangieri’s seminal work, Franklin highlighted a passage about the criminal law that, translated from the Italian, reads: “If criminal laws prevent crimes, scaring the citizens with the threat of punishments, surely they cannot bring forth the virtues. That sort of negative honesty, that comes from fear of punishment, feels its effects from its beginning.” In a section “Of the absolute goodness of the law,” Filangieri addressed the issue of slavery, with Franklin marking passages with marginal notations. Franklin would also draw attention to a section on the people’s right to happiness and to a passage reciting that only Pennsylvania had no slaves.³²⁵

In early America, the debate over slavery—like the debate over corporal and capital punishment—began before the Revolutionary War came to a close. Vermont’s constitution of 1777 banned slavery, and in 1780, the Pennsylvania legislature passed An Act for the Gradual Abolition of Slavery. That constitution and that act were two of the first efforts in the Western hemisphere to rid society of slavery. The Pennsylvania act, passed on March 1, 1780, prohibited the importation of slaves into the state; required slaveholders to annually register their slaves; and provided that any child born in Pennsylvania would be free or—in the case of children born to slaves—indentured servants until the age of 21. In 1780, there were 575,420 slaves in the U.S., with 56,796 in northern states and a much

³²⁵ “Gaetano Filangieri and Benjamin Franklin: The Relationship Between the Italian Enlightenment and the U.S. Constitution,” pp. 98-99, 103-8, 117 n.185, *available at* http://sedi2.esteri.it/sitiweb/AmbWashington/Pubblicazioni/2_filangieri_interno.pdf

heavier concentration, 518,624, in southern states.³²⁶ It would take many years—and a bloody Civil War—before the issue of slavery was resolved once and for all.

I. The “Absolute Necessity” for Punishment

For America’s founders, the legitimacy of punishment—as strongly evidenced by the historical record—depended on its *absolute necessity*,³²⁷ a notion they adopted right from Europe’s dynamic duo, Beccaria and Montesquieu.³²⁸ For example, on July 20, 1786, while in London, John Adams

³²⁶ 1 JUNIUS P. RODRIGUEZ, ED., *SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL, AND HISTORICAL ENCYCLOPEDIA* 23 (Santa Barbara, CA: ABC-CLIO, 2007).

³²⁷ Mary Price, *Everything Old Is New Again: Fixing Sentencing by Going Back to First Principles*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 75, 78 (2010) (“The Founding Fathers were well aware of the principle of parsimony; it is a concept that traces back at least to Montesquieu and was articulated by the influential Italian criminologist, Cesare Beccaria: ‘Every punishment, which does not arise from absolute necessity, says the great Montesquieu, is tyrannical.’”). Ironically, although Beccaria’s book was placed on the Index of Forbidden Books, the Roman Catholic Church later embraced Beccaria’s proportionality and “absolute necessity” principles. Peter J. Riga, *Capital Punishment: Is the Catholic Church Abolitionist?*, 41 CATH. LAW. 241, 244 (2002) (reprinting § 2266 of the Catechism of the Catholic Church that speaks of punishments that are “proportionate to the gravity of the offense”); id. at 245 (quoting § 2267 of the Catechism of the Catholic Church as follows: “Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitively taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity ‘are very rare, if not practically non-existent.’”); id. at 245-47 (quoting Pope John Paul II’s encyclical *Evangelium Vitae*, which reads in part as follows: “[T]he nature and extent of the punishment must be carefully evaluated and decided upon, and ought not to go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.”).

³²⁸ HOSTETTLER, CESARE BECCARIA, *supra* note 3, at 72; CESARE BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS* 17 (Philadelphia: 2d Am. trans ed. 1819) (“Every punishment which does not arise from absolute necessity, says the great Montesquieu, is tyrannical.”); Russell L. Christopher, *Deterring Retributivism: The Injustice of ‘Just’ Punishment*, 96 NW. U. L. REV. 843, 867 n.128 (2002) (“Quoting Montesquieu, Beccaria

recorded in his diary the following Beccaria quotation from his own English translation of *On Crimes and Punishments*: “Every Act of Authority, of one Man over another for which there is not an absolute Necessity, is tyrannical.” Adams then wrote out the following words in Italian: “*Le pene che oltrepassano la necessità di conservare il deposito della Salute pubblica, sono ingiuste di lor natura.*” The translation: “all punishments that go beyond” necessity—or the requirements of public safety—are “inherently unjust.”³²⁹ The very title of William Bradford’s widely distributed essay, *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania*, confirms that the fundamental question early Americans wrestled with so intensely was whether executions were truly necessary.³³⁰ If they were not, the founders considered them unjust.³³¹ A

asserted that ‘punishment which does not derive from absolute necessity . . . is tyrannical.’”).

³²⁹ GRAEME R. NEWMAN & PIETRO MARONGIU, TRANS., CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* xlviii (New Brunswick, NJ: Transaction Publishers, 5th ed. 2009).

³³⁰ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 85; *see also* “From the Village Record of Aug. 13,” THE ADAMS SENTINEL (Gettysburg, PA), Sept. 3, 1828, p. 1 (“Humanity is a distinguished characteristic of the American people. They have a deep abhorrence of all cruel and unnecessary punishments.”).

³³¹ Steven H. Jupiter, *Constitution Notwithstanding: The Political Illegitimacy of the Death Penalty in American Democracy*, 23 FORDHAM URB. L.J. 437, 476 n.191 (1995) (“Just before the signing of the Declaration of Independence, Jefferson drafted three proposals for Virginia’s constitution. In each draft, Jefferson proposed that the General Assembly of the state “have no power to pass any law inflicting death for any crime, excepting murder, and those offenses in the military service for which they shall think punishment by death absolutely necessary: and all capital punishments in other cases are hereby abolished”) (citing Thomas Jefferson, Third Draft of the Virginia Constitution (1776), *reprinted in* 1 THE PAPERS OF THOMAS JEFFERSON 359 (Julian P. Boyd ed. 1950)); Alex Ricciardulli, *Getting to the Roots of Judges’ Opposition to Drug Treatment Initiatives*, 25 WHITTIER L. REV. 309, 318 n.33 (2003) (“American philosopher William Bradford built on the ideas of Montesquieu and Beccaria. In the 1800s, Bradford wrote a pamphlet, which argued that punishments not absolutely necessary to prevent crimes are cruel and unnecessary.”) (citing William Bradford, *An Enquiry How Far the Punishment for Death Is Necessary in Pennsylvania*, 12 AM. J. LEG. HISTORY 122, 135 (1968)); Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1172 n.116 (2006) (noting that William Bradford believed the following principle has

number of American court decisions, in one context or another, have held that only punishments and disciplinary actions that are necessary³³²—indeed, absolutely necessary—are permissible.³³³

“obtained the force” of an axiom: “That every punishment which is not absolutely necessary for that purpose [the prevention of crime] is a cruel and tyrannical act.”); Michael J. Zydney Mannheimer, *Not the Crime But the Cover-Up: A Deterrence-Based Rationale for the Premeditation-Deliberation Formula*, 86 IND. L.J. 879, 914 (2011) (“Rush and Bradford each also parroted Beccaria's views on parsimony. Rush, favorably quoting Empress Catharine II of Russia, wrote: ‘That a punishment . . . might be conformable with justice, it ought to have such a degree of severity as might be sufficient to deter people from committing the crime.’ Bradford posited as an axiom ‘[t]hat every punishment which is not absolutely necessary for th[e] purpose [of preventing crime] is a cruel and tyrannical act.’”); compare JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H.L.A. Hart eds., Athlone 1970) (1789) (“But all punishment is mischief; all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”).

³³² *Territory v. I. M. Cox*, 24 Hawai‘i 461, 463 (Sup. Ct. Terr. Hawai‘i 1918) (“The law . . . does not license the teacher to inflict corporal punishment at will but, in the words of our statute, which is substantially the common law rule, the punishment must be necessary and reasonable.”).

³³³ *McKee v. McKee*, 231 S.W. 213, 214 (Ky. Ct. App. 1921) (“We are not prepared to say that one spouse may never inflict corporal punishment upon the other in the absolutely necessary defense of himself or herself or some member of the family”); *United States v. Hicks*, 37 F.2d 289, 293 (9th Cir. 1930) (“Surely the tremendous power of inflicting such a punishment should never be permitted to be exercised unless absolutely necessary to protect the court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession.”); *Richards v. Jain*, 168 F. Supp. 2d 1195, 1200 (W.D. Wash. 2001) (the harsh penalty of disqualification of counsel “should be imposed only when absolutely necessary”); *In re the Matter of Firestorm*, 916 P.2d 411, 416 (Wash. 1991) (same); *State v. Shumaker*, 145 N.E. 769, 788 (Ind. 1927) (“There is a growing reluctance in the courts to resort to an exercise of the power to punish for contempt except where absolutely necessary to the fair and orderly administration of justice”) (citation omitted); *Ex Parte Wall*, 2 S. Ct. 569, 614 (1883) (Field, J., dissenting) (“Surely the tremendous power of inflicting such a punishment should never be permitted to be exercised unless absolutely necessary to protect the court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession.”); cf. *Nelson v. Bondurant*, 26 Ala. 341, 344 (Ala. 1855) (it is averred, in the context of case involving the whipping of a slave, that the slave owner “did not inflict any cruel or unnecessary punishment, but only such moderate castigation as was absolutely necessary”); *Turner v. Turner*, 62 S.W. 607, 612 (Ct. of Chancery Appeals, 1901) (“no more punishment was inflicted than was absolutely necessary”); *Hardy v. State*, 804 So.2d 247, 295 (Ind. Ct. Crim. App., 1999) (“There has been absolutely no showing that the State’s method of enforcing a death sentence inflicts any more pain than is absolutely necessary.”).

IV. THE IMPACT OF THE ITALIAN ENLIGHTENMENT ON AMERICAN LAW

a. Beccaria's Enormous Popularity

On Crimes and Punishments became a popular source for Americans to cite as they debated whether to abolish executions. At Yale's 1788 commencement exercises, Jeremiah Mason—one of the graduates—squared off in a debate with a classmate later identified as “the Rev. Dr. Chapin.” The debate topic: “Whether capital punishment was in any case lawful.” As Mason contemporaneously recorded in his diary: “I held the negative. I stole most of my arguments from the treatise of the Marquis Beccaria, then little known in this country. It was new, and consequently well received by the audience; indeed, its novelty excited considerable notice. I was flattered and much gratified by being told that my performance was the best of the day.”³³⁴ By then, Beccaria's ideas had actually already been reprinted in American magazines and newspapers, including in the local *New Haven Gazette and Connecticut Magazine*, a fact apparently lost on young Jeremiah Mason. “Had the student realized that just two years earlier a local newspaper had serialized Beccaria's essay,” historian Louis Masur notes in *Rites of Execution*, “he might have been less zealous in his plagiarism.”³³⁵

Early American lawyers—trained as they were in the English common law—felt somewhat beholden to traditional practices even as they sought to

³³⁴ MEMOIR, AUTOBIOGRAPHY AND CORRESPONDENCE OF JEREMIAH MASON 12 (Kansas City, MO: Lawyers' International Pub. Co., 1917).

³³⁵ MASUR, RITES OF EXECUTION, *supra* note 94, at 52.

curtail what they viewed as the English legal system's excesses.³³⁶ When Thomas Jefferson drafted his Virginia bill for proportioning crimes and punishments he consequently cited Beccaria as well as a host of more traditional, and far less progressive, sources.³³⁷ Jefferson's draft legislation nonetheless plainly showed Beccaria's influence as it sought to dramatically curtail the use of executions by limiting the number of offenses that would be punishable by death. Still, the concept of proportionality that Jefferson used in the bill—and that he later rejected—was based on his understanding of the *lex talionis* principle of an eye for an eye and a tooth for a tooth. Jefferson's draft legislation, for example, called for poisoning those who poisoned and maiming those who maimed.³³⁸ Some of Jefferson's thinking and language closely tracked what appeared in *On Crimes and Punishments*,³³⁹ but Jefferson—like many early Americans—had difficulty completely breaking away from antiquated common law punishments.³⁴⁰ Only

³³⁶ ROD GRAGG, *FORGED IN FAITH: HOW FAITH SHAPED THE BIRTH OF THE NATION 1607-1776*, at 22, 88, 185 (New York: Howard Books, 2010).

³³⁷ "A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital," in 2 JULIAN P. BOYD ET AL., EDS., *THE PAPERS OF THOMAS JEFFERSON* (Princeton, NJ: Princeton University Press, 1950).

³³⁸ BESSLER, *CRUEL AND UNUSUAL*, *supra* note 66, at 142.

³³⁹ Thomas Jefferson to Edmund Pendleton, Aug. 26, 1776, *available at* wwwFOUNDERS.archives.gov; Thomas Jefferson to Maria Cosway, Oct. 12, 1786 (Jefferson writes of "abolishing sanguinary punishments" and "reforming and improving our laws in general"), *available at* wwwFOUNDERS.archives.gov. In a draft bill to establish a government for the "territory of Columbia," Jefferson included this typical provision: "Excessive bail shall not be required, nor excessive fines imposed nor cruel & unusual punishment inflicted." Jefferson Papers, Draft Bill [Before 7 December 1801], *available at* wwwFOUNDERS.archives.gov.

³⁴⁰ See Jeffery K. Sawyer, *The Rhetoric and Reality of English Law in Colonial Maryland, Part I—1632-1689*, 108 MARYLAND HISTORICAL MAGAZINE 393, 393 (2013) ("The history of English law in Maryland produced such powerful elements in local political culture, that even as the British colonial regime collapsed (1774-1776), the right of the inhabitants to English common law and selected British statutes was enshrined and preserved in the state's first constitution."); Jeffery K. Sawyer, *English Law and American Democracy in the Revolutionary Republic: Maryland, 1776-1822*, 108

later did Jefferson's notion of proportionality more closely resemble Beccaria's, and only later did Jefferson more prominently single out Beccaria with changing American views on capital punishment.³⁴¹

As he drafted his bill in the 1770s, Thomas Jefferson—who copied twenty-six different passages from *Dei delitti e delle pene* into his commonplace book—had major reservations about retaliatory punishments, concerns he expressed to Virginia lawyer and jurist George Wythe, his trusted mentor and friend.³⁴² “The ‘Lex talionis,’” Jefferson told Wythe, another Beccaria reader,³⁴³ “will be revolting to the humanized feelings of modern times.” “An eye for an eye, and a hand for a hand,” Jefferson wrote in 1778, “will exhibit spectacles in execution, whose moral effect would be questionable.”³⁴⁴ After Virginia penal reform finally became a reality in 1796 thanks to the efforts of George Keith Taylor, John Marshall's brother-in-law, Jefferson embraced the change, as he

MARYLAND HISTORICAL MAGAZINE 261, 261 (2013) (“On the one hand, English law had been built into the basic fabric of American law through authorizing charters, governor's commissions, and like acts, as well as by decades of specific local legislation and judicial decisions in colonial courts. On the other hand, government based on the sovereignty of the people and common sense was a fundamental purpose of the fight for independence.”); id. at 263 (“Between 1776 and 1784, eleven of the original thirteen states made some provision for the continuing authority of the common law and British statutes.”); id. at 268 (“In 1776 the common law was understood almost universally in the English-speaking world as a body of ancient principles underpinning the fundamental rights of free Englishmen and as a vast repository of specific rules, substantive and procedural, that defined property rights, differentiated ‘lawful’ from ‘unlawful’ acts in everyday commerce, defined criminality and provided a system for dealing with criminals, and so on.”).

³⁴¹ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 183-84.

³⁴² BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 54.

³⁴³ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 185.

³⁴⁴ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 141; 1 HENRY S. RANDALL, THE LIFE OF THOMAS JEFFERSON 218 (Philadelphia: J. B. Lippincott, 1863).

made clear in an 1809 letter to Skelton Jones.³⁴⁵ And toward the end of his life, in the 1820s, Jefferson went out of his way to laud Beccaria, making this statement

³⁴⁵ Thomas Jefferson to Skelton Jones, July 28, 1809, *available at* wwwFOUNDERS.archives.gov. In that letter, Jefferson described his involvement in the 1770s project to revise Virginia's laws, then applauds the adoption of the penitentiary system. As Jefferson wrote to Jones:

[A]fter settling our plan, Col^o Mason declined undertaking the execution of any part of it, as not being sufficiently read in the law. mr Lee very soon afterwards died, & the work was distributed between M^r Wythe, mr Pendleton & myself. to me was assigned the Common law (so far as we thought of altering it), & the statutes down to the Reformation, or end of the reign of Elizabeth; to mr Wythe the subsequent body of the statutes, & to mr Pendleton the Virginia laws. this distribution threw into my part the laws concerning crimes & punishments, the law of descents, & the laws concerning religion. after completing our work separately, we met (mr W. mr P. & myself) in Williamsburg, and held a very long session, in which we went over the 1st & 2^d parts in the order of time, weighing & correcting every word, & reducing them to the form in which they were afterwards reported. when we proceeded to the 3^d part, we found that mr Pendleton had not exactly seized the intentions of the committee, which were to reform the language of the Virginia laws, and reduce the matter to a simple style & form. he had copied the acts verbatim, only omitting what was disapproved; and some family occurrence calling him indispensably home, he desired mr Wythe & myself to make it what we thought it ought to be, and authorised us to report him as concurring in the work. we accordingly divided the work, & reexecuted it entirely so as to assimilate it's plan & execution to the other parts, as well as the shortness of the time would admit, and we brought the whole body of British statutes, & laws of Virginia into 127. acts, most of them short. this is the history of that work as to it's execution. it's matter & the nature of the changes made will be a proper subject for the consideration of the historian. experience has convinced me that the change in the style of the laws was for the better, & it has sensibly reformed the style of our laws from that time downwards, insomuch that they have obtained in that respect the approbation of men of consideration on both sides of the Atlantick. whether the change in the stile & form of the criminal law, as introduced by mr Taylor, was for the better is not for me to judge. the digest of that act employed me longer than I believe all the rest of the work; for it rendered it necessary for me to go with great care over Bracton, Britton the Saxon statutes, & the works of authority on criminal law: & it gave me great satisfaction to find that in general I had only to reduce the law to it's antient Saxon condition, stripping it of all the innovations & rigorisms of subsequent times, to make it what it should be. the substitution of the Penitentiary instead of labor on the high road, & of some other punishments truly objectionable, is a just merit to be ascribed to mr Taylor's law. when our report was made, the idea of a

in an autobiographical reflection: “Beccaria and other writers on crimes and punishments had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death.”³⁴⁶

By then, Jefferson recognized, Beccaria not only had shaped American and European law, but had—for the better—questioned and upended long-standing legal customs, transforming legal thought for the world’s benefit.³⁴⁷ Indeed, it seems clear from an examination of a letter that Jefferson sent to John Adams in 1819 that Jefferson, even later in life, was re-reading Beccaria’s treatise—or, perhaps, had just internalized key passages from it. Writing from Monticello on December 10, 1819, Jefferson—after expressing his concern about “the Missouri question,” that is, whether that state should be admitted as a free or slave state—penned these words: “I have been amusing myself latterly with

Penitentiary had never been suggested: the happy experiment of Pennsylvania we had not then the benefit of.

Id.

³⁴⁶ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 145.

³⁴⁷ SUZANNE DESAN, LYNN HUNT & WILLIAM MAX NELSON, EDS., *THE FRENCH REVOLUTION IN GLOBAL PERSPECTIVE* 27 (Ithaca, NY: Cornell University Press, 2013) (“It would be difficult to overstate Beccaria’s influence on the movement for French legal reform. *On Crimes and Punishments* deepened the thinking of a long line of liberal magistrates, lawyers, and philosophers, from Voltaire and Michel Antoine Servan to Jacques Pierre Brissot and Marquis de Condorcet. Nowhere did the influence of Beccaria make such a profound impact on political thought as in the writings of Malesherbes, president of the *Prais cour des aides*.”); *see also* FRANCIS T. CULLEN & PAMELA WILCOX, EDS., *ENCYCLOPEDIA OF CRIMINOLOGICAL THEORY* 76 (Thousand Oaks, CA: Sage Publications, 2010):

Beccaria’s *On Crimes and Punishments* met with immediate literary and political successes. Beccaria’s critiques and suggestions for reforms were accepted by many leading European intellectuals and by several prominent heads of state, including Catherine the Great, who sought unsuccessfully to hire Beccaria to plan legal reform in Russia, and by Peter Leopold, who in 1786, as Grand Duke of Tuscany (and several years before becoming the Holy Roman Emperor), became the first European head of state to abolish capital punishment. Beccaria’s ideas inspired many other European heads of state to take up legal or penal reform, for example in Prussia, Sweden, and the Austrian Empire.

reading the voluminous letters of Cicero.” After referring to Rome, and asking himself what Cicero, Cato and Brutus could have done if they’d been tasked—amidst all the Roman corruption in their age—“to establish a good government,” Jefferson concluded: “[t]hey had no ideas of government themselves but of their degenerate Senate.” “They had afterwards,” Jefferson added, “their Titusses, their Trajans and Antoninuses, who had the will to make them happy, and the power to mould their government into a good and permanent form.”³⁴⁸

In a section of *On Crimes and Punishments* that immediately follows a scathing attack on the death penalty, Beccaria himself promises that any monarch who rejects the death penalty will be embraced “with the secret affirmation of all mankind.” As Beccaria put it: “a just posterity will assign him first place among the peaceful trophies of the Tituses, of the Antonines and the Trajans.”³⁴⁹ In other words, any monarch abolishing capital punishment would later be celebrated in the history books. The similarity of Beccaria’s and Jefferson’s wording—in particular, their reference to the same three Roman emperors—shows, along with his recommendation of *On Crimes and Punishments* to others, that Jefferson maintained an intimate familiarity with Beccaria’s treatise throughout his life.

b. From a “Sanguinary” System to the Penitentiary System

In the founding period, as well as in the generations that came after those who lived through America’s colonial days and the hard-fought Revolutionary War, many Americans devoted their energies to replacing “sanguinary” laws and

³⁴⁸ Thomas Jefferson to John Adams, Dec. 10, 1819, *reprinted in* JOYCE APPLEBY & TERENCE BALL, EDS., *JEFFERSON: POLITICAL WRITINGS* 225-26 (Cambridge: Cambridge University Press, 1999).

³⁴⁹ GRAEME R. NEWMAN & PIETRO MARONGIU, TRANS., CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 75-76 (New Brunswick, NJ: 5th ed., 2009).

punishments with a new “penitentiary” system.³⁵⁰ Inspired by Quakers and other like-minded Pennsylvania civic leaders, Philadelphia’s Walnut Street Prison—considered to be America’s first modern penal institution, and which facilitated a switch from executions to incarceration—opened its doors in 1790.³⁵¹ Prior to that time, U.S. jails and prisons were often makeshift or decrepit facilities, full of vice and disease. They resembled—or actually were—horrid dungeons, as was the case of a Connecticut prison that made use of a former copper mine to house offenders in the 1770s. In the caverns of Connecticut’s Simsbury prison, inmates labored underground and were chained in overcrowded cages.³⁵² Thomas Jefferson had a strong interest in prison architecture and construction, even submitting plans for Virginia’s penitentiary, and many leading architects of Jefferson’s time took on commissions to design and build state prisons.³⁵³

The American political system and its lawmakers—intent on rejecting England’s “Bloody Code”—thus gradually moved away from reliance on capital offenses to deter crime. As one writer, penning an article for *The Christian*

³⁵⁰ O. F. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS 1776-1845*, at 8-9, 11, 13-14, 46, 151, 257, 325, 342 (Albany, NY: Prison Association of New York, 1922).

³⁵¹ *Id.* at 25, 271, 293. This institution became a source of great pride for Pennsylvania citizens, with penal reformers like Cesare Beccaria and John Howard given a measure of credit for the reform of the state’s laws. *E.g.*, “Philadelphia, April 27,” *THE NORTH-CAROLINA JOURNAL* (Halifax, NC), May 13, 1799, p. 2 (“The public prisons of Pennsylvania, and especially that of Philadelphia, even according to the confession of prejudiced foreigners, are under the mildest and most salutary discipline of any in the known world.”); *id.* (“The spirit of Howard has ameliorated our penal code, and over the lives and conduct of our criminals the maxims of Beccaria preside.”).

³⁵² MITCHELL P. ROTH, *PRISONS AND PRISON SYSTEMS: A GLOBAL ENCYCLOPEDIA* 341 (Westport, CT: Greenwood Press, 2006).

³⁵³ BESSLER, *THE BIRTH OF AMERICA LAW*, *supra* note 1, at 311-14; KEES DE MOOY, ED., *THE WISDOM OF THOMAS JEFFERSON* 20 (New York: Citadel Press Books, 2003); Thomas Jefferson to James Buchanan and William Hay, Jan. 26, 1786, *available at* [www.founders.archives.gov](http://wwwFOUNDERS.archives.gov).

Examiner and Theological Review, later editorialized of the “Sanguinary” system: “As a system, it has completely failed.” “The Penitentiary System,” by contrast, that writer emphasized, “had its origin in the United States, and trial has been made of it by the principal members of the Union.”³⁵⁴ Virginia governor James Monroe—later the fifth U.S. President—would describe Virginia’s penitentiary, on which construction began in 1797, as a “benevolent system.” The penitentiary system, Monroe noted, was based on the idea that “in punishing crime, the society or rather the government ought not to indulge in the passion of revenge.”³⁵⁵ A similar movement in England—to “put a stop to sanguinary punishments,” considered by many English intellectuals and reform-minded republicans to be “a disgrace”—had also gotten underway across the Atlantic.³⁵⁶

The development of America’s penitentiary system—built out on a state-by-state basis, and intended to reign in such “sanguinary” punishments—would take considerable time to mature.³⁵⁷ After Pennsylvania’s Walnut Street Prison opened shortly before the ratification of the U.S. Bill of Rights in 1791, other states soon followed suit. New York passed legislation in 1796 providing for the construction of the Newgate state prison in Greenwich Village; New Jersey

³⁵⁴ 3 THE CHRISTIAN EXAMINER AND THEOLOGICAL REVIEW 204-205 (Boston: David Reed, 1826).

³⁵⁵ HARRY AMMON, JAMES MONROE: THE QUEST FOR NATIONAL IDENTITY 180 (Charlottesville: University of Virginia Press, 1990).

³⁵⁶ LAURIE THRONES, A PROTESTANT PURGATORY: THEOLOGICAL ORIGINS OF THE PENITENTIARY ACT, 1779, at 119-20 (Hampshire, UK: Ashgate Publishing, 1998). In the House of Commons, Beccaria’s name, not surprisingly, also came up—a fact later reported in the United States. “Debates on the Penitentiary Bill, In the House of Commons, December 7, 1801,” RALEIGH REGISTER AND NORTH-CAROLINA STATE GAZETTE (Raleigh, NC), Jan. 5, 1802, p. 1.

³⁵⁷ 2 GEORGE E. BAKER, ED., THE WORKS OF WILLIAM H. SEWARD 174 (New York: Redfield, 1853; GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 39, 106, 119 (Carbondale, IL: Southern Illinois University Press, 1979) (1833).

completed its state penitentiary in 1797; and penitentiaries in Virginia and Kentucky opened in 1800, the same year Massachusetts appropriated money for one.³⁵⁸ A new penitentiary also opened in Maryland in 1811.³⁵⁹ And it wasn't long before other penitentiaries got built, though it took the federal government longer to get involved in such projects and efforts. The year 1816 saw the opening of New York's Auburn Prison, and New York's Sing Sing Prison began operating in 1825. The first penitentiary established by the federal government, on the site of modern-day Fort McNair, was built in 1826, with thinkers like John Howard and Cesare Beccaria laying the foundation for this reform. The next federal penitentiary, the much more well-known one at Fort Leavenworth, Kansas, did not open until the 1890s.³⁶⁰ Beccaria's admission of the cruelty of imprisoning debtors—a judgment made after *On Crimes and Punishments* first hit the presses—was also used in early nineteenth-century America to campaign against imprisonment for debtors.³⁶¹

It is perhaps no coincidence that, in many states, penitentiaries were authorized in close proximity to the curtailment of death-eligibility for certain classes of offenders. For example, the Philadelphia Society for Alleviating the

³⁵⁸ SHAHID M. SHAHIDULLAH, *CRIME POLICY IN AMERICA: LAWS, INSTITUTIONS, AND PROGRAMS* 61 (Lanham, MD: University Press of America, 2008).

³⁵⁹ WILBUR R. MILLER, ED., *THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA* 1074 (Thunder Oaks, CA: Sage Publications, 2012).

³⁶⁰ JOHN T. WHITEHEAD, MARK JONES & MICHAEL C. BRASWELL, *EXPLORING CORRECTIONS IN AMERICA* 46-47 (Newark, NJ: Matthew Bender & Co., 2008); BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 314.

³⁶¹ “No. I. *Abolition of imprisonment for debt*,” *NEW-YORK EVENING POST* (New York, NY), Feb. 28, 1871, p. 2 (noting that “[i]n a subsequent edition of Beccaria,” the Italian author—“with a degree of candor and nobleness of soul”—“frankly and fully admits that his former impressions” on “the reasonableness of the law which enabled the creditor to imprison his debtor” were “erroneous, and retracts them”; “*I am ashamed of having adopted so cruel an opinion*,” Beccaria confessed.).

Miseries of Public Prisons was formed in 1787, with Dr. Benjamin Rush attending that organization's first meeting. As one source explains of that society: "In 1789, the society, with Rush as its primary spokesperson, attempted to improve the lot of inmates incarcerated at Philadelphia's Walnut Street Jail. The General Assembly agreed and designated the facility a penitentiary."³⁶² Indeed, penitentiaries—whether in Europe or America—were commonly seen as a more humane alternative to frequent executions, just as English authorities often imposed sentences of "transportation," or exile, in lieu of death sentences and the gallows.³⁶³

An English sheriff, John Howard (1726-1790), had brought the maltreatment of prisoners into focus, with Howard lobbying the House of Commons in 1774 to reform horrendous prison conditions. Howard had been inspired by Beccaria's work and, after engaging in his own advocacy, earned—like Montesquieu and Beccaria—many devoted American disciples. In 1777, Howard published an account of the state of prisons in England and Wales, and eventually, the British Parliament acted, passing the Penitentiary Act of 1779. That bill was drafted by Howard, Sir William Blackstone and William Eden—all

³⁶² G. LARRY MAYS & L. THOMAS WINFREE, JR., *ESSENTIALS OF CORRECTIONS* 39-40 (Belmont, CA: Wadsworth, 4th ed. 2009).

³⁶³ JULIUS R. RUFF, *VIOLENCE IN EARLY MODERN EUROPE 1500-1800*, at 112-13 (Cambridge: Cambridge University Press, 2001); PATRICIA EWICK, ROBERT A. KAGAN & AUSTIN SARAT, EDS., *SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW* 47-48 (New York: Russell Sage Foundation, 1999); W. DAVID LEWIS, *FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848*, at 15, 23-34, 58 (Ithaca, NY: Cornell University Press, 2009); MARK JONES & PETER JOHNSTONE, *HISTORY OF CRIMINAL JUSTICE* 151 (Waltham, MA: Anderson Publishing, 5th ed. 2012).

of whom were influenced by Beccaria's treatise.³⁶⁴ Dr. Benjamin Rush was an avid reader of John Howard's *State of the Prisons in England and Wales, with Preliminary Observations, and an Account of Some Foreign Prisons* (1777), with Rush calling himself "a pupil and admirer of the celebrated Mr. Howard."³⁶⁵

In America, as in Europe, the building of penitentiaries came to be seen as a progressive measure. As a member of Virginia's House of Delegates, George Keith Taylor—a leading lawyer from Petersburg, Virginia—is considered "the father of penal reform" in that state for leading the effort to amend its antiquated penal code.³⁶⁶ It was once written of George Keith Taylor that he "embodied the principles of Beccaria in the criminal code of a state"—the Commonwealth of Virginia—"and founded a penitentiary, the complement of that enlightened measure."³⁶⁷ Even many decades after its first appearance, *On Crimes and Punishments* was still being read, thus influencing American policymakers.³⁶⁸ For instance, in New York, it is known that Lewis Lawes (1883-1947)—a prison

³⁶⁴ TODD R. CLEAR, GEORGE F. COLE & MICHAEL D. REISIG, *AMERICAN CORRECTIONS* 38 (Belmont, CA: Wadsworth, 10th ed. 2013); MARK GOLDIE & ROBERT WOKLER, *EDS., THE CAMBRIDGE HISTORY OF EIGHTEENTH-CENTURY POLITICAL THOUGHT* 567 (Cambridge: Cambridge University Press, 2006); MARILYN MCSHANE & FRANK P. WILLIAMS III, *CRIMINAL JUSTICE: CONTEMPORARY LITERATURE IN THEORY AND PRACTICE* 780 n.6 (New York: Garland Publishing, 1997).

³⁶⁵ DAVID FREEMAN HAWKE, *BENJAMIN RUSH: REVOLUTIONARY GADFLY* 364 (Atlanta, GA: Ardent Media 1971).

³⁶⁶ RONALD R. SEAGRAVE, *DINWIDDIE COUNTY VIRGINIA: A BRIEF HISTORY* 34 (Charleston, SC: The History Press, 2012).

³⁶⁷ WINFIELD SCOTT, *MEMOIRS OF LIEUT.-GENERAL SCOTT, LL.D.* 26 (New York: Sheldon & Co., 1864).

³⁶⁸ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 64.

warden at Sing Sing who bitterly opposed capital punishment but who oversaw more than 300 executions—read works by both Beccaria and Howard.³⁶⁹

In *Law Miscellanies: An Introduction to the Study of the Law*, Hugh Henry Brackenridge—a member of the Supreme Court of Pennsylvania—specifically wrote of Beccaria’s impact on the American polity in 1814. As Brackenridge wrote: “Elementary writers, at the head of whom is the marquis de Beccaria, have with great plausibility, questioned the right of society to punish, by taking life at all.”³⁷⁰ Brackenridge was a Princeton classmate of James Madison, and the two men were friends. For example, in a 1774 letter to William Bradford Jr., another friend of Madison’s from their college days together, Madison wrote: “When you have an opportunity and write to Mr. Brackenridge, pray tell him I often think of him, and long to see him, and resolved to do so in the spring.” Along with Philip Franeau, Madison and Brackenridge wrote a poetical dialogue called “The Rising Glory of America” that was read at Princeton’s graduation exercises and printed in 1772.³⁷¹

Though the entire U.S. penitentiary system was not completed in their lifetimes, America’s Founding Fathers expressed great hopes for that system. In the 1820s, James Madison wrote one Quaker reformer, Roberts Vaux, that “the Penitentiary System” was “an experiment so deeply interesting to the cause of

³⁶⁹ ANTHONY JAMES, *NEW LOOK AT CAPITAL PUNISHMENT* 128 (New York: Belmont Tower Books 1977); “Lewis E. Lawes, Former Sing Sing Warden, Succumbs,” *THE EVENING INDEPENDENT* (St. Petersburg, FL), Apr. 23, 1947, p. 2.

³⁷⁰ HUGH HENRY BRACKENRIDGE, *LAW MISCELLANIES: CONTAINING AN INTRODUCTION TO THE STUDY OF THE LAW* 497 (Philadelphia: P. Byrne, 1814).

³⁷¹ James Madison to William Bradford, Jr., Jan. 24, 1774, in 1 *THE WRITINGS OF JAMES MADISON* 16-21 (1900).

Humanity.”³⁷² In 1823, Madison even wrote to a veteran from Kentucky, a physician, who had written to ask the former President about his views on capital punishment. That veteran and honorary member of the Lexington Medical Society, G. F. H. Crockett, had sent Madison a copy of Crockett’s extended essay, *An Address to the Legislature of Kentucky on the Abolition of Capital Punishments, in the United States, and the Substitution of Exile for Life*, an essay that specifically invoked Beccaria’s name.³⁷³ Madison’s response: “I should not regret a fair and full trial of the entire abolition of capital punishments by any State willing to make it: tho’ I do not see the injustice of such punishments in one case at least.”³⁷⁴ In 1827, Madison also wrote a letter to another correspondent who had sent the ex-President a report on Pennsylvania’s penal system. In that letter, Madison said he was “attracted to what related to the penitentiary discipline as a substitute for the cruel inflictions so disgraceful to penal codes.”³⁷⁵ In other words, unduly harsh punishments such as executions were on their way out—and more humane alternatives were actively being sought.

c. The Eighth Amendment and “Cruel” Punishments

It was in this cultural milieu that American laws were being forged and in which the U.S. Constitution’s Eighth Amendment prohibition on “cruel and unusual punishments” must be understood if one is to look back at America’s founding era. When the English Bill of Rights was adopted in 1689, the

³⁷² BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 159.

³⁷³ G. F. H. Crockett, *An Address to the Legislature of Kentucky, on the Abolition of Capital Punishments, in the United States, and the Substitution of Exile for Life* (Georgetown, KY: N. L. Finnell, 1823).

³⁷⁴ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 158.

³⁷⁵ *Id.* at 159.

English—at Tyburn and other execution sites—were routinely using public hangings to dispatch all kinds of offenders. Sometimes, much more grotesque forms of execution—drawing and quartering and boiling in oil, for example—were used to kill offenders.³⁷⁶ By the time the U.S. Constitution was ratified, however, Pennsylvania had already curtailed the number of death-eligible crimes. In 1786, the year before the Constitutional Convention in Philadelphia, the people of Pennsylvania eliminated the death penalty for robbery, burglary and sodomy. And more reforms, both in Pennsylvania and other American states, would soon follow as experimentation with Beccaria’s theories continued in America in the post-Revolutionary War period.³⁷⁷

The Eighth Amendment was ratified in 1791, and between the publication of Beccaria’s treatise in the 1760s and the ratification of the U.S. Bill of Rights, much change had already taken place in terms of the law and Americans’ perceptions of crime and punishment. Indeed, on the subject of cruelty, Pennsylvania’s James Wilson—the attorney-legislator who later became a jurist and, in 1790, the first law professor at the College of Philadelphia—was no fan of executions and called “cruelty” the “parent of slavery.” Wilson, the legal mind who so freely invoked Beccaria’s name, called “cruel” punishments “dastardly” and “contemptible.” James Wilson’s papers are peppered with references to Beccaria, with the references made in a wide variety of contexts, from the prevention of crime to the best structure for republics. ““An overgrown

³⁷⁶ TERANCE D. MIETHE & HONG LU, *PUNISHMENT: A COMPARATIVE PERSPECTIVE* 42-43 (Cambridge: Cambridge University Press, 2005).

³⁷⁷ MICHAEL MERANZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760-1835*, at 21 (Chapel Hill: University of North Carolina Press, 1995).

republick,’ says the Marquis of Beccaria, in the exquisite performance with which he has enriched the treasures of legislation,” Wilson wrote in one instance, ““can be saved from despotism, only by subdividing it into a number of confederate republicks.””³⁷⁸

Thomas Paine—often considered the Father of the American Revolution because he authored *Common Sense*—himself believed executions were “barbarous” and “cruel spectacles” to be abolished.³⁷⁹ In *Rights of Man*, Paine wrote in 1791: “When, in countries that are called civilized, we see age going to the workhouse and youth to the gallows, something must be wrong in the system of government. Civil government does not exist in executions, but in making such provision for the instruction of youth and the support of age.”³⁸⁰ In short, education and reducing poverty—things Beccaria advocated too—were the key to reducing crime, not executions, the method that had been used for centuries. And in *The Federalist Papers*, when Alexander Hamilton—the country’s first treasury secretary—defended the presidential pardoning power, he said it was necessary to avoid “sanguinary” or “cruel” results.³⁸¹ His rationale for preserving the presidential pardoning power: it was still needed in light of then-existing punishments. The idea of avoiding cruelty, one advocated for by a host of Europeans and early Americans, had come straight from penal reformers like Blackstone, Montesquieu and Beccaria.³⁸²

³⁷⁸ BESSLER, CRUEL AND UNUSUAL, *supra* note 66, at 52-53, 163-66.

³⁷⁹ *Id.* at 108.

³⁸⁰ *Id.* at 106.

³⁸¹ ANDREW C.A. JAMPOLER, *THE LAST LINCOLN CONSPIRATOR: JOHN SURRETT’S FLIGHT FROM THE GALLOWES* 291 n.6 (Annapolis, MD: Naval Institute Press, 2008).

³⁸² BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 219-26.

The momentous impact of Beccaria's *On Crimes and Punishments* can be felt in American law, even though Beccaria's name nowhere appears in early American state constitutions. By the time American states began writing their own constitutions in 1776, Beccaria's treatise had already shaped the framers' thoughts and views, dramatically changing the way they talked about crime and punishment. As Pulitzer Prize-winning historian Gordon Wood emphasizes: "Many of the Revolutionary state constitutions of 1776 evoked the enlightened thinking of the Italian reformer Cesare Beccaria and promised to end punishments that were 'cruel and unusual' and to make them 'less sanguinary and in general more proportionate to the crimes.'"³⁸³ In a series of lectures delivered in the 1890s by Yale University professor John Dillon, one finds similar sentiments. In one of those lectures, later compiled and published in Boston as *The Laws and Jurisprudence of England and America*, Dillon reported: "In this country we never adopted the extreme severities of the English statutes. We were early influenced by the views of Beccaria. Instead of hanging we condemned the criminal to labor for a term of years in what we named a penitentiary." "Pennsylvania," Dillon said, "led the way to this great change by a provision in her Constitution in 1776."³⁸⁴

After the Revolutionary War came to a close, Beccaria's treatise remained an oft-quoted source for American lawyers and legal commentators. The ideas of Beccaria—and other Enlightenment writers—inspired written codes of law and

³⁸³ GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 492 (Oxford: Oxford University Press, 2009).

³⁸⁴ JOHN FORREST DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA: BEING A SERIES OF LECTURES DELIVERED BEFORE YALE UNIVERSITY* 368 (Boston: Little, Brown, and Co., 1894).

the codification of U.S. laws. That the U.S. Constitution and the Bill of Rights—in contrast to the unwritten “English constitution”—are *written* documents is a reflection of this Enlightenment approach and the very Beccarian impulse favoring codification.³⁸⁵ The Rule of Law—dependent on the knowledge of the law by the people—was furthered by the codification of important legal principles. Just as codified laws gave the public notice of their rights and responsibilities, the increased use of written judicial opinions—a byproduct of Enlightenment thinkers, such as Beccaria, seeking to curtail runaway judicial discretion—allowed for better public scrutiny of them. Adhering to the Rule of Law, the fabric of which would be strengthened by the people’s acceptance of the laws as put in place by the people’s elected representatives, helped eliminate arbitrariness in the application of the law.³⁸⁶ The notion of “due process” embodied in the U.S. Constitution’s Fifth Amendment³⁸⁷—and later, in the Fourteenth Amendment, which also added “equal protection of the laws” as an

³⁸⁵ Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 771-72 (1997) (“The English had never indulged the Enlightenment conceit that a formal constitution was necessary for modern government. It was their culture of self-government, their common sense and decency, that distinguished their evolving commitment to democratic principles—not paper constitutions and institutional gimmicks like judicial review.”); Markus Dirk Dubber, *The Pain of Punishments*, 44 BUFF. L. REV. 545, 593 (1996) (“Bentham . . . along with every other enlightenment reformer of law at the time, sought to eliminate the discretion of judges and called for a strict literalism and formalism in the judicial application of codes. Judicial discretion to these reformers was an obstacle in the path of the enlightened modernization of the law through codification. As a result, enlightenment reformers of the law, from Montesquieu in France, Frederic II in Prussia, Beccaria in Italy, Feuerbach in Bavaria, to Bentham in England, thought it imperative to require literal application of their new codes and to prohibit non-official commentaries.”).

³⁸⁶ Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium*, 86 CHI.-KENT L. REV. 613, 615 n.18 (2011) (“In Italy, Enlightenment thinkers Cesare Beccaria and Gaetano Filangieri shared Montesquieu’s views and sought to make the judge’s role as mechanistic and automatic as possible.”).

³⁸⁷ U.S. CONST., amends. V & XIV.

explicit guarantee³⁸⁸—is rooted in the idea of having like offenders treated alike and in having the law treat everyone, as much as humanly possible, uniformly.³⁸⁹

d. Republicanism and the Rule of Law

The writings of John Adams on republicanism and the rule of law are put in much better context when Beccaria's writings and those of other Enlightenment thinkers are considered. In his 1776 pamphlet, *Thoughts on Government*, Adams wrote that “there is no good government but what is republican” and that “the very definition of a republic is ‘an empire of laws and not of men.’” In November 1775, Adams had been asked by a Virginia politician, Richard Henry Lee, for his thoughts on the proper structure of government should a break with Great Britain occur, and in March 1776, two North Carolina delegates to Congress, John Penn and William Hooper, had also approached Adams for advice.³⁹⁰ Adams' suggestions were in line with Beccaria's views and those of the Enlightenment generally, with Adams writing: “No man will contend that a nation can be free that is not governed by fixed laws. All other government than that of permanent known laws, is the government of mere will and pleasure, whether it be exercised by one, a few, or many.” In his 1811 essay on “A Government of Laws and Not of Men,” Adams further explained that “it is very true there can be no good

³⁸⁸ U.S. CONST., amend. XIV.

³⁸⁹ See generally John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913 (2012).

³⁹⁰ STEPHEN L. SCHECHTER, ED., *ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED* 123 (Lanham, MD: Madison House Publishers, 1990).

government, without laws: but those laws must be good, must be equal, must be wisely made.”³⁹¹

Adams, the drafter of the Massachusetts Constitution of 1780, the oldest continuously operating constitution in the world,³⁹² thus believed in a system of fixed and non-arbitrary laws.³⁹³ He was, of course, an avid reader of Beccaria’s treatise, having read *On Crimes and Punishments* a full decade before drafting the Massachusetts Constitution of 1780 as he prepared to defend British soldiers accused of murder following the Boston Massacre.³⁹⁴ Indeed, in *A Defence of the Constitutions of Government of the United States*, Adams not only praised American constitutions for their use of separation-of-powers principles—“the legislative, executive, and judicial powers are carefully separated,” Adams wrote—but for how “nicely balanced” legislative powers had been calibrated as regards “the powers of the one, the few, and the many” such that “the laws alone can govern.” “In all free states,” Adams wrote, echoing a theme that both Montesquieu and Beccaria had advanced, “the evil to be avoided is tyranny; that is to say, the *summa imperii*, or unlimited power, solely in the hands of the one, the few, or the many.”

³⁹¹ Richard Samuelson, “John Adams and the Republic of Laws,” in BRYAN-PAUL FROST & JEFFREY SIKKenga, EDS., *HISTORY OF AMERICAN POLITICAL THOUGHT* 114 (Lanham, MD: Lexington Books, 2003).

³⁹² 1 JAMES A. GARDNER, ED., *STATE EXPANSION OF FEDERAL CONSTITUTIONAL LIBERTIES: INDIVIDUAL RIGHTS IN A DUAL CONSTITUTIONAL SYSTEM* ix (New York: Psychology Press, 1999).

³⁹³ The Declaration of Rights of the 1780 Massachusetts Constitution envisioned “a government of laws and not of men.” Constitution of the Commonwealth of Massachusetts (1780), Art. XXX.

³⁹⁴ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 174.

Later, Adams wrote about “encroachments of the few upon the rights of the many, and of the many upon the privileges of the few; which ever did, and ever will, conclude in a tyranny; first either of the few or the many, but at least, infallibly, of a *single person*.” “The desires of men, are not only exorbitant, but endless: they grasp at all; and can form no scheme of perfect happiness with less,” Adams warned, expressing concerns about ambitious men and about the “spirit of cruelty and revenge” and “injustice, sophistry, and fraud.” “[A] balance can never be established between two orders in society, without a third to aid the weakest,” Adams offered, returning to a Beccarian theme. Explicitly referencing “an inequality of wealth” in Massachusetts as well as another “species of inequality,” the happenstance of one’s birth and ancestors, Adams worried about “severe laws” and “tyrannical laws” executed “in a tyrannical manner.” Saying that obedience to “unjust and unequal laws” would be “incompatible with liberty,” Adams emphasized: “yet no man will contend, that a nation can be free, that is not governed by fixed laws.”³⁹⁵

Adams’ views were in line with Beccaria’s, with H. Jefferson Powell—a Duke University law professor—once explaining Beccaria’s pervasive influence on American and European thinkers.³⁹⁶ “In his enormously influential essay on

³⁹⁵ 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE, DATED THE TWENTY-SECOND DAY OF MARCH, 1778, at 96, 99, 103, 108, 110-11, 120, 124 (Philadelphia: William Cobbett, 3d ed. 1797).

³⁹⁶ Cesare Beccaria’s influence would extend throughout the United States. James W. Ely, Jr. & David J. Bodenhamer, *Regionalism and American Legal History: The Southern Experience*, 39 VAND. L. REV. 539, 557 (1986) (“The tenets of revolutionary republicanism demanded a limitation on the power of the state, thus stimulating criminal law reform throughout the new nation, including the South. Heavily influenced by eighteenth century rationalism, the writings of Montesquieu and Cesare Beccaria, and the

criminal law,” Powell writes, “the Italian jurist Cesare Beccaria wrote that judges in criminal cases must not be allowed the authority to interpret the laws because that would make them de facto legislators. Beccaria contrasted ‘the constant fixed voice of the law’ with ‘the erring instability of interpretation,’ and his firm conclusion—‘the interpretation of laws is an evil’—expressed a view widely shared by educated and ‘progressive’ individuals in the late eighteenth century.”³⁹⁷ The Beccarian notion of equality would also show up in debate over the proposed Constitution itself, with Melancton Smith—at New York’s ratification convention in June 1788—specifically invoking Beccaria’s name. In arguing for participation in government by “[t]he middling class,” Smith—worried about the rich assuming disproportionate control over governmental powers for their own benefit—pulled out the same quote from *On Crimes and Punishments* that the Continental Congress had cited to the people of Quebec.³⁹⁸ Beccaria’s proposed alternative for the death penalty—“perpetual slavery”—would even find expression in the Thirteenth Amendment, which outlawed slavery and involuntary servitude “except as a punishment for crime whereof the party shall have been duly convicted.”³⁹⁹

“The American Constitution,” NYU law professor David Richards writes, “is a historically remarkable attempt to use the best political theory and political science of the age, combined with a diverse practical experience of democratic

codification efforts of Edward Livingston, southern legislators by the 1820s had drafted criminal codes that rivaled those of northern jurisdictions.”).

³⁹⁷ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 893 (1985).

³⁹⁸ STEPHEN L. SCHECHTER, ED., *ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED* 416-19 (Lanham, MD: Madison House, 1990).

³⁹⁹ U.S. CONST., amend. XIII.

self-rule, to give a written text of substantive and procedural constraints on and definitions of state power that would achieve in America what has never been achieved elsewhere: enduring republican government in a large territory.” As Richards explains: “The Constitution, followed shortly by the Bill of Rights, is a self-conscious product of reflection on past republican experiments (Greece, Rome, the Florentine and Venetian republics, the Cromwellian commonwealth) and the republican political theory and science of their emergence, stability, and decline (Polybius, Machiavelli, Guicciardini, Giannotti, Harrington, Locke, Sidney).”⁴⁰⁰ Indeed, the central question posed in Adams’ *A Defence of the Constitutions* echoes themes found in *On Crimes and Punishments*. As Adams framed what he called “[t]he great question”: “What combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that the citizens may constantly enjoy the benefit of them, and be sure of their continuance.”⁴⁰¹

After citing Montesquieu for the proposition that “every man invested with power is apt to abuse it,” Adams wrote: “To prevent the abuse of power, it is necessary, that, by the very disposition of things, power should be a check to power.” Adams then quoted Beccaria in the original Italian: “*Ogni uomo si fa*

⁴⁰⁰ David A.J. Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489, 526 (1985).

⁴⁰¹ 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE, DATED THE TWENTY-SECOND DAY OF MARCH, 1778, at 128 (Philadelphia: William Cobbett, 3d ed. 1797).

centro di tutte le combinazioni del globo.”⁴⁰² The translation: “Every man makes himself the center of his whole world.”⁴⁰³ Referring to Montesquieu, Beccaria and other writers as philosophers, Adams queried: “Shall we say that all these philosophers were ignorant of human nature?” Adams’ answer: “With all my soul, I wish it were in my power to quote any passages in history or philosophy, which might demonstrate all these satires on our species to be false. But the phenomena are all in their favour; and the only question to be raised with them is, whether the cause is wickedness, weakness, or insanity?”⁴⁰⁴ John Adams read many English writers—from Locke to Sidney and from Harrington to Hobbes.⁴⁰⁵ But Montesquieu and Beccaria—both from civil law countries—shaped Adams’ views in important ways too, with Beccaria right there with Montesquieu.⁴⁰⁶

Beccaria’s treatise and Montesquieu’s, along with a host of other Enlightenment books authored by writers such as Rousseau and Delolme, were actually must-read texts for any republican or any progressive, reform-minded judge or legislator. In an influential American legal commentary, Nathaniel Chipman (1752-1843)—a U.S. Senator from Vermont and, at one time, the Chief Justice of the Vermont Supreme Court—specifically singled out Beccaria’s book on the criminal law, writing: “The world is more indebted to the Marquis

⁴⁰² Id. at 131-32.

⁴⁰³ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 17-18.

⁴⁰⁴ 1 JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE, DATED THE TWENTY-SECOND DAY OF MARCH, 1778*, at 133 (Philadelphia: William Cobbett, 3d ed. 1797).

⁴⁰⁵ BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT* 186 (Princeton: Princeton University Press, 1994).

⁴⁰⁶ GEORGE A. PEEK, JR., ED., *THE POLITICAL WRITINGS OF JOHN ADAMS* xiv (Indianapolis, IN: Hackett Pub. Co., 1954).

Beccaria, for his little treatise on Crimes and Punishments, than to all other writers on the subject.”⁴⁰⁷ The result of this influence, as Alexis de Tocqueville recorded in *Democracy in America* in 1840: “In no other country is criminal justice administered with more mildness than in the United States. Whilst the English seem disposed carefully to retain the bloody traces of the Middle Ages in their penal legislation, the Americans have almost expunged capital punishment from their codes.” The fact that Tocqueville and his companion, Gustave Beaumont, explicitly made their trip to America to study the country’s penal system is itself revealing.⁴⁰⁸

Beccaria’s treatise became a fixture of American legal thought, reflecting the sentiments shared by many Americans about the needless severity of traditional, English common-law punishments. By the time Uriah M. Rose—the founder and first president of the Arkansas State Bar Association⁴⁰⁹—delivered an address to his colleagues in the legal profession in 1900, he had this to say: “If we except Montesquieu, whose work was rather critical and suggestive than constructive, Beccaria was the first of the modern law reformers in point of time; and, if we judge solely by benefits conferred, he was by far the greatest of all.” “It may be,” Rose wrote, “that Beccaria was not profound; but he was a thoroughly sane man, with that rare kind of common sense, possessed by men like

⁴⁰⁷ NATHANIEL CHIPMAN, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT* 198 n.* (Rutland, VT: J. Lyon, 1793).

⁴⁰⁸ 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 104 (Stilwell, KS: Digireads, 2007).

⁴⁰⁹ Uriah Milton Rose (1834-1913), *The Encyclopedia of Arkansas History & Culture*, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=2271>. Rose was also one of the original seventy-five founders of the American Bar Association. Id.

Washington, which easily adjusts itself to great subjects.” Noting that Beccaria’s book “made a great stir everywhere,” especially in Paris, after its publication, Rose concluded: “The victory of Beccaria has become complete. The principles that he announced are now embodied in every criminal code in Christendom: and they have even penetrated the distant Orient.”⁴¹⁰

V. CONCLUSION

Montesquieu’s writings on separation of powers inspired America’s founders to create a system of checks and balances. Although Montesquieu’s influential *Spirit of the Laws* (1748), quickly translated into English in 1750, came first,⁴¹¹ to neglect Cesare Beccaria’s contributions to early American law and social thought would be to jettison a truthful recitation of history. As the 1774 open letter of the Continental Congress to the inhabitants of Quebec demonstrates, the writings of Montesquieu *and* Beccaria—along with a host of other Enlightenment sources—inspired American revolutionaries. To think about Montesquieu’s influence to the exclusion of Beccaria’s would be to consider, in effect, only half the equation. The founders greatly admired Montesquieu, but they also thought highly—indeed, very much revered—Beccaria’s criminal-law essay. As Americans continue to debate the U.S. Constitution’s meaning, the role Beccaria’s ideas played in shaping early American laws and political leaders should thus not be forgotten. Beccaria—like other, now obscure Italian thinkers,

⁴¹⁰ U. M. Rose, *Beccaria and Law Reform*, 8 THE AMERICAN LAWYER: A MONTHLY JOURNAL SERVING THE BUSINESS AND PROFESSIONAL INTERESTS OF THE AMERICAN BAR 298, 299, 303 (New York: Stumpf & Steurer, 1900) (“Being Portions of an Address Delivered as President of the Arkansas State Bar Association at Its Meeting held at Little Rock” on January 3, 1900).

⁴¹¹ BESSLER, THE BIRTH OF AMERICAN LAW, *supra* note 1, at 4, 29.

such as Pietro Verri and Giacinto Dragonetti, who came before and after him—had important things to say about everything from happiness and republicanism⁴¹² to education, to avoiding tyranny, to suppressing crime and avoiding unnecessary punishments. These Italian writers, to be sure, made an impression on America’s founding generation, if only through the conduit of Beccaria’s book or Beccaria’s profound influence on other Enlightenment figures read by the founders.⁴¹³

Ironically, while America still retains capital punishment in the twenty-first century, England—the country from which America’s founders inherited executions and the legal prohibition on “cruel and unusual punishments”—no longer allows executions. Great Britain abolished capital punishment altogether in 1998, though the last executions in England took place in 1964.⁴¹⁴ Along with the rest of Europe, Beccaria’s native land, a now unified Italy, has also outlawed

⁴¹² See Barbara Pozzo, *Masculinity Italian Style*, 13 NEV. L.J. 585, 591 (2013) (“As a famous leader of the Italian Enlightenment, Cesare Beccaria developed a harsh critique of the role and the powers of the master of the family, a patriarch with unlimited powers on the rest of the family.”); Lyn Suzanne Entzeroth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-first Century*, 90 OR. L. REV. 797, 801 (2012) (noting Beccaria’s influence on America’s founders and emphasizing that “[r]epublican ideals of the early United States, as well as Christian tenets, served as a key impetus to the early death penalty debate and opposition to capital punishments”).

⁴¹³ Alessandro Spena, *Iniuria Migrandi: Criminalization of Immigrants and the Basis Principles of the Criminal Law*, 8 CRIM. L. & PHIL. 635, 645 (2014) (“One of the distinctive claims of the eighteenth century Enlightenment penal reformers (such as the Italian Pietro Verri and Cesare Beccaria, or the English philosopher Jeremy Bentham) and the nineteenth century post-Enlightenment liberal reformers (such as the German criminal law theorist Anselm von Feuerbach or the English philosopher John Stuart Mill) was indeed the attribution of a general capacity of reason to everybody (including—potential or actual—criminals).”). Thomas Paine, one source notes, generally “avoids literary allusions,” though he did refer to the Bible and quote from Dragonetti and Milton in making his case against the monarchy. BRUCE KUKLICK, *THOMAS PAINE: INTERNATIONAL LIBRARY OF ESSAYS IN THE HISTORY OF SOCIAL AND POLITICAL THOUGHT* 407 (Ashgate, 2006).

⁴¹⁴ *THE DEATH PENALTY: ABOLITION IN EUROPE* 182 (Strasbourg: Council of Europe Publishing, 1999).

executions.⁴¹⁵ The European Union, in fact, has banned the export of lethal injection drugs to the United States,⁴¹⁶ and Europe itself is now a death penalty-free zone, with specific protocols in place prohibiting the death penalty's use in both peacetime and wartime.⁴¹⁷ Any country hoping to gain admittance to the European Union, with its trade and economic benefits, must agree to stop using executions. And extraditions from Europe to the U.S. are not done anymore unless assurances are obtained that the death penalty will not be sought.⁴¹⁸ Indeed, a number of African countries—among them Rwanda and South Africa, with their respective histories of genocide and apartheid—no longer allow state-sanctioned killing either.⁴¹⁹ This puts America, the earliest leaders of which embraced Beccaria's writings, in the uncomfortable company of authoritarian,

⁴¹⁵ HUGO ADAM BEDAU, ED., *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 83 (Oxford: Oxford University Press, 1997).

⁴¹⁶ Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1360 (2014) ("In late 2010, the British government announced plans to create an export restriction that would ban the export of sodium thiopental to the United States after learning that the drug would be solely used for executions."); Corinna Barrett Lain, *The Virtues of Thinking Small*, 67 U. MIAMI L. REV. 397, 401 (2013) ("Great Britain produces sodium thiopental too, but it banned the export of lethal injection drugs to the United States and urged the European Union to do same, which it did. Under the EU's new rule, pharmaceutical manufacturers may not export drugs used for executions in the United States unless they have a special permit showing that the export is not for executions.").

⁴¹⁷ BARRY LATZER & DAVID MCCORD, *DEATH PENALTY CASES: LEADING U.S. SUPREME COURT CASES ON CAPITAL PUNISHMENT* 424 (Burlington, MA: Butterworth-Heinemann, 3d ed. 2011).

⁴¹⁸ *Kansas v. Marsh*, 548 U.S. 163, 187 n.3 (2010) (Scalia, J., concurring) ("Abolishing the death penalty has been made a condition of joining the Council of Europe, which is in turn a condition of obtaining the economic benefits of joining the European Union.").

⁴¹⁹ JEANMARIE FENRICH, PAOLO GALIZZI & TRACY E. HIGGINS, EDS., *THE FUTURE OF AFRICAN CUSTOMARY LAW* 44-46, 402 (Cambridge: Cambridge University Press, 2011).

pro-death penalty regimes like China, Iran, North Korea, Saudi Arabia and Yemen.⁴²⁰

With death sentences and executions in the United States declining in number, America's death penalty—long associated with rampant errors, racial discrimination and miscarriages of justice—has become as arbitrary as ever.⁴²¹ America's founders, living in an age before the maturation of the U.S. penitentiary system, saw executions as necessary. Over time, however, death penalty opponents have emphasized that the need for executions (as perceived by the founders, at least for crimes such as murder and treason) has greatly diminished, with one letter to the editor—published in 1854—putting it this way:

As this country has progressed in christianity and intelligence and everything that tends to make a nation happy, the people have abolished many obnoxious laws which were adopted when our fathers had just emerged from a long and bloody war for freedom, and which were then absolutely necessary to insure the stability of the government; yet Capital Punishment retain[s] its hold upon the confidence of legislators, with a tenacity that would seem to indicate that they look upon it as a sacred and irrevocable law. They do not stop to consider how society would be benefitted by having it blotted out⁴²²

In twenty-first century America, with the development of maximum-security prisons and the use of life-without-parole sentences, however, executions

⁴²⁰ VICKI SCHIEBER, TRUDY D. CONWAY & DAVID MATZKO MCCARTHY, EDS., *WHERE JUSTICE AND MERCY MEET: CATHOLIC OPPOSITION TO THE DEATH PENALTY* (Collegeville, MN: Liturgical Press, 2013). In 2012, Amnesty International recorded executions in 21 countries, a small fraction of the world's nations, with the United States being the only country in the Americas to carry out any executions that year. Indeed, in America itself, only nine of its fifty states executed anyone in 2012, with Connecticut becoming the 17th American state to abolish the death penalty. Amnesty International, *Death Sentences and Executions 2012*, at 6 (2013).

⁴²¹ Death Penalty Information Center, *Facts about the Death Penalty* (November 9, 2016) (showing how executions and death sentences have been declining in number in the U.S.).

⁴²² "Capital Punishment," *PITSTON GAZETTE* (Pittston, PA), June 2, 1854, p. 2

can no longer be considered necessary. American lawmakers—as well as the U.S. courts—would thus do well to recall Beccaria’s abolitionist vision, a vision first articulated more than 250 years ago and focused on moderation of the severity of punishments.⁴²³ Lawmakers and lawyers, as well as American judges, should especially take to heart the words of the late U.S. President and Beccaria admirer Thomas Jefferson. As Jefferson wrote in 1816 in words that would, decades later, be carved into stone at the Jefferson Memorial in Washington, D.C.: “laws and institutions must go hand in hand with the progress of the human mind.” “As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances,” Jefferson emphasized, “institutions must advance also, and keep pace with the times.” “We might as well require a man to wear still the coat which fitted him when a boy,” Jefferson warned, “as civilized society to remain ever under the regimen of their barbarous ancestors.”⁴²⁴

Even more broadly, twenty-first century Americans should recall the role that Cesare Beccaria played in the lead-up to the American Revolution. Beccaria’s writings helped to inspire the American Revolution, which then

⁴²³ John D. Bessler, *Tinkering Around the Edges: The Supreme Court’s Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913 (2012). Beccaria-inspired appeals to abolish America’s death penalty are certainly not new. Dr. Benjamin Rush—a signer of the Declaration of Independence and a Beccaria disciple sometimes called the “American Beccaria”—pushed for the total abolition of capital punishment even before the 1787 Constitutional Convention. BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 212.

⁴²⁴ Paul Zummo, “Thomas Jefferson’s America: Democracy, Progress, and the Quest for Perfection,” Ph.D. thesis, The Catholic University of America, Washington, D.C. (2008), pp. 115-16.

spawned the French Revolution.⁴²⁵ Eventually, Italians themselves—led by General Giuseppe Garibaldi (1807-1882), who had gained fame as a guerrilla commander in South America—fought for, and achieved, their own independence. The First Italian War of Independence (1848-49), a struggle for national unity, failed, but it was followed a decade later by a second (1859-1861) and, then, just a few years later, a third. The first war, fueled by revolutionary riots that drove Austrians out of Milan, had been fought between the Kingdom of Piedmont-Sardinia and the Austrian Empire in Lombardy, while the second war—a seminal event in the story of Italian unification—pitted the Second French Empire and the Kingdom of Piedmont-Sardinia against Austrian authorities.⁴²⁶ In 1835, Garibaldi had sailed to South America, where he participated in the Brazilian Civil War and with revolutionary forces in Uruguay; then, in 1848, Garibaldi had returned to Italy to offer his services to the Sardinian king. After fighting there, he had left Italy again in 1850, spending time in Tangiers, Gibraltar and England before making his way—during a period of exile—to America at the age of 43. “Few men,” the *New York Herald* wrote of Garibaldi, who spent time in New York and Baltimore before returning to Italy for good in 1854, “have

⁴²⁵ MARVIN PERRY, MARGARET JACOB, JAMES JACOB, MYRNA CHASE, THEODORE VON LAUE, EDS., *WESTERN CIVILIZATION: IDEAS, POLITICS, AND SOCIETY* 461 (Boston: Houghton Mifflin Harcourt, 9th ed. 2009) (“The American Revolution, which gave practical expression to the liberal philosophy of the philosophes, also helped pave the way for the French Revolution. The Declaration of Independence, which proclaimed the natural rights of man and sanctioned resistance against a government that deprived men of these rights, influenced the framing of the Declaration of the Rights of Man and of the Citizen.”).

⁴²⁶ ASHLEY J. TELLIS & MICHAEL WILLS, EDS., *TRADE, INTERDEPENDENCE, AND SECURITY* 336 (Seattle, WA: The National Bureau of Asian Research, 2006); *WORLD AND ITS PEOPLES: ITALY, MALTA, AND SAN MARINO* 777-78 (Tarrytown, NY: Marshall Cavendish Reference, 2010); FREDERICK C. SCHNEID, *THE SECOND WAR OF ITALIAN UNIFICATION 1859-61*, at 11 (Oxford, U.K.: Osprey Publishing, 2012).

achieved so much for the cause of freedom, and no one has accomplished so many heroic acts for the independence of a fatherland, as General Garibaldi has for Italy.”⁴²⁷

In the second war, the French army was commanded by Napoleon III, and in northern Lombardy, Giuseppe Garibaldi’s volunteers defeated Austrian forces at Como and Varese. But Napoleon III, worried about the entry of German states into the conflict, cut a deal and signed an armistice with the Austrians, leading to Sardinian outrage as Franz Joseph and Napoleon III met at Villafranca in July 1859 to ink their deal. The following year, in 1860, the Duchy of Parma, the Duchy of Modena, the Grand Duchy of Tuscany and the Papal Legations were ultimately incorporated into the Kingdom of Sardinia, but Nice—in a move opposed by Garibaldi, a native—went to France as a spoil of war. After Garibaldi’s forces took Naples and other parts of southern Italy in 1860, the height of “the Italian *risorgimento*,” the Kingdom of Italy came into existence in 1861 when King Victor Emmanuel II of Sardinia was proclaimed King of Italy. “During the late spring and early summer of 1862, while American diplomatic officials tried to induce him to join the Union Army,” one history notes, “Garibaldi prepared to liberate Rome from Napoleon III and the French troops who were invited into the city by the Pope.” It wasn’t until much later—in 1946, long after the cries of “On to Rome with Garibaldi” were heard—that Italians adopted a republican constitution after a referendum.⁴²⁸ During the Civil War,

⁴²⁷ FRANK W. ALDUINO & DAVID J. COLES, *SONS OF GARIBALDI IN BLUE AND GRAY: ITALIANS IN THE AMERICAN CIVIL WAR* 24-28 (Youngstown, NY: Cambria Press, 2007).

⁴²⁸ *WORLD AND ITS PEOPLES: ITALY, MALTA, AND SAN MARINO* 778-79 (Tarrytown, NY: Marhsall Cavendish Reference, 2010); D. MACK SMITH, *CAVOUR AND GARIBALDI:*

President Abraham Lincoln even tried to recruit Garibaldi—who had American citizenship and who opposed slavery and supported “universal liberty”—because of his fame as a military commander. Later, in 1866 and 1867, Garibaldi raised 40,000 volunteers and led the fight to unify Italy, his homeland.⁴²⁹

In an address heralding Garibaldi’s role in Italian efforts to obtain independence, the famed Victor Hugo—invoking Beccaria’s earlier anti-death penalty advocacy—delivered an impassioned address that was picked up in Lisbon, Ohio’s *Anti-Slavery Bugle* in 1860. Coming on the heels of the fiery abolitionist John Brown’s execution in America, Victor Hugo’s speech railed against slavery. “John Brown succumbs in America, but Garibaldi triumphs in Europe,” he said, issuing the rallying cry “*Viva la Liberte*” before continuing on: “Yes, since America, alas, sullenly conservative of slavery, bends towards

A STUDY IN POLITICAL CONFLICT 1860, at 1, 207 (Cambridge: Cambridge University Press, 1954); FREDERICK C. SCHNEID, THE SECOND WAR OF ITALIAN UNIFICATION 1859-61, at 11-12, 82-83 (Oxford, U.K.: Osprey Publishing, 2012). Northern Italy had a long history of conflict. See POVOLO, THE NOVELIST AND THE ARCHIVIST, *supra* note 38, at 14:

Northern Italy was first unified by Napoleon into the Kingdom of Italy in 1805 and subsequently, by the Austrians, into the Kingdom of Lombardy-Venetia in 1815. It was, of course, hostility to Austrian rule over the north of Italy that animated much of Manzoni’s own passionate opposition to foreign rule. But it was also the integration of Venice and Milan into a unified state that makes it possible that Manzoni might have seen the trial from Venice, as Povoletto’s reconstruction of the career of Agostino Carli Rubbi—the archivist of Povoletto’s title—makes clear. First, Rubbi was one of the few figures in the emerging bureaucracy of the archives who had access to the trial against Paolo Orgiano. Secondly, Rubbi and others in his circle such as Andrea Mustoxidi had long had connections to the intellectual milieu in Milan where Rubbi had in fact studied under Beccaria. And, thirdly, Rubbi may have—though here the proof is not definitive—travelled to Milan in late 1820 where, if he did make such a journey, it is possible that he would have met Manzoni and been able to show him the trial.

⁴²⁹ ALDUINO & COLES, SONS OF GARIBALDI IN BLUE AND GRAY, *supra* note 427, at 32-37, 40-41.

darkness, let Europe illuminate herself.” “Yes,” Hugo urged, “let that civilization of the old continent which has abolished superstition by Pascal, slavery by Wilberforce, and the scaffold by Beccaria, yes, let that elder civilization reappear with its splendor, which can never again be extinguished, and let it erect above mankind its ancient pharos composed of three grand flames—France, England, and Italy.”⁴³⁰

During the U.S. Civil War itself, which claimed hundreds of thousands of lives, few references can be found to Beccaria. There are plenty of references to “Beccaria Township” in Pennsylvania,⁴³¹ but a search of the newspapers.com database for the period from 1861 to 1865 revealed no references in American newspapers to Beccaria himself or his ideas. It was only after the Civil War, when a delegation of Italians petitioned President Andrew Johnson to spare the former Confederate President, Jefferson Davis, from the gallows, that Beccaria’s name fleetingly reappears when the press reported that the delegation made a special appeal to Beccaria, their Italian hero whose star had clearly not faded in Europe. “From Washington,” a North Carolina paper reported, “we are informed that on Saturday afternoon an Italian committee, composed of Prof. Achille Magni, Mr. Henry Fardella, who lately distinguished himself as general in the union army, and Mr. Theodore Manera, who fought for the independence of Italy, all residents of New York, gained an introduction to President Johnson, in order to present to His Excellency the following petition, sent to Prof. Archille Magni,

⁴³⁰ “Victor Hugo on Garibaldi,” *ANTI-SLAVERY BUGLE* (Lisbon, OH), June 14, 1860, p. 1.

⁴³¹ *E.g.*, “Beccaria Township,” *RAFTSMAN’S JOURNAL* (Clearfield, PA), May 28, 1862, p. 4.

by the committee in Milan: *To His Excellent Andrew Johnson, President of the United States of America.*” Professor Magni, after introducing his colleagues to President Johnson, explained the purpose of their visit as follows:

MR. PRESIDENT: The public opinion in Italy, such as it may be represented by the former ministers of the government, B. Ricasoli and Minghetti, by the present premier, Gen. A. La Marmora, a number of senators, by 161 representatives, and by the most distinguished men and associations of that country, is in favor of supporting the humane idea of our great statesman, Cesare Beccaria, i.e., to have *capital punishment abolished*.

This effort, organized in Milan to save the life of Jefferson Davis, had the support of “liberal-minded men in Europe, such as Victor Hugo.” Indeed, in Milan, the Italians dedicated a whole monument to Cesare Beccaria in a ceremony that took place in 1871 on the former site of the hangman’s house.⁴³² In March 1865, Hugo—after being nominated to be a part of the commission that would organize the monument to Beccaria—wrote a letter with these words of endorsement for the project: “Setting up a statue to Beccaria is equivalent to abolishing the scaffold. If, once set up, the scaffold came up from the ground, the statue would go back into it.”⁴³³ Upon learning of the purpose of the visit to the Executive Mansion, President Johnson—“with an accent of surprise”—“interrupted the speaker, saying ‘*They plead for Jefferson Davis?*’” “Yes,” Professor Magni replied, “they delegated us to present to Your Excellency their original petition, and they hope that, by vouchsafing their supplication, you would

⁴³² The bronze statue of Cesare Beccaria in Milan’s Piazza Beccaria is a replica of the original marble statute, erected in 1871, sculpted by Giuseppe Grande. 1 KARL BAEDER, *ITALY: HANDBOOK FOR TRAVELLERS* 140 (Leipsic: Karl Baedeker, 1903); HOSTETTLER, *CESARE BECCARIA*, *supra* note 3, at 33.

⁴³³ BESSLER, *THE BIRTH OF AMERICAN LAW*, *supra* note 1, at 74.

crown this glorious country with the land of peace, and give to all nations an unparalleled example of magnanimity and wisdom, which will shine to all future generations, and bring blessing upon you forever.”⁴³⁴

The Italian delegation then presented President Johnson with a “PETITION OF ITALIANS” by the “CENTRAL EXECUTIVE COMMITTEE FOR THE NATIONAL MONUMENT TO THE FIRST SUPPORTER OF THE ABOLITION OF CAPITAL PUNISHMENT, CESARE BECCARIA, PLAZZA BORROMEÓ, NO. 5, MILAN, July 21, 1865.” The petition was signed by Giuseppe Garibaldi and the executive committee for the erection of a monument to Cesare Beccaria, and it read in part as follows: “The death of President Lincoln plunged us into mourning, but the execution of Davis would make us blush. We cannot comprehend through what necessity the justice of a great and victorious people could imitate the vengeance of an assassin detested even by your vanquished as infamous.” “While public opinion in Europe compels the monarchs to mitigate the rigor of the laws by exercising ‘their right of grace,’ the petition continued, ‘the friends of human progress are tremblingly awaiting your action, and hoping that the American people, at least in time of peace, will take the axe from the fasces of their lictors.’”⁴³⁵

⁴³⁴ “Jefferson Davis—The Italians Interceding in His Behalf,” *THE DAILY DISPATCH* (Wilmington, DE), Nov. 10, 1865, p. 4.

⁴³⁵ J. L. Pennington, “The Very Latest by Last Night’s Mail,” *THE DAILY PROGRESS* (Raleigh, NC), Oct. 28, 1865, p. 1; “Petition from Italy in Behalf of Jefferson Davis,” *THE WILMINGTON HERALD* (Wilmington, NC), Oct. 30, 1865, p. 1; “From Italy—Petition in Behalf of Jefferson Davis,” *THE NEW BERN TIMES* (New Bern, NC), Nov. 4, 1864; “Jefferson Davis,” *THE GALVESTON DAILY NEWS*, Nov. 9 1865, p. 2 (“We refer to the petition in behalf of Mr. Davis from Italy, signed by the patriot Garibaldi, the Philosopher, N. Tomageo, the committee for the erection of a monument to Cæsar Beccaria, and for the abolition of capital punishment . . .”).

Beccaria's game-changing treatise shaped European and American attitudes and laws. The Civil War, however, coarsened the American conversation about capital punishment, poisoning the well for decades to come. More than 250 Union soldiers were executed during the Civil War, and many executions took place on the Confederate side, too.⁴³⁶ A particularly telling indication of the tremendous setback suffered by America's anti-death penalty movement is that one U.S. author, anti-gallows activist Marvin Bovee, even delayed the publication of his book, *Christ and the Gallows*, until after the Civil War was over. Originally slated for publication in 1861, Bovee—a leader in the movement from Wisconsin—decided to wait until 1869, a few years after the Civil War, to release his book. To have presented his book during the Civil War, Bovee said, “would have been ‘ill-timed,’ to say the least.”⁴³⁷ By 1912, shortly before another war, World War I, an op-ed in the *El Paso Herald* and *The Salt Lake Tribune* was recalling the initial publication of *Dei delitti e delle pene* in 1764—how *On Crimes and Punishments* had been “given to the world”—but simultaneously lamenting how Beccaria had, in effect, essentially been forgotten. “If human happiness is a holy thing,” the Rev. Thomas B. Gregory wrote, “then it may be said, unhesitatingly, that there was never a holier book written than Caesar Bonesana Beccaria's.” “And yet how many memorials do we find to the

⁴³⁶ See EDWARD C. JOHNSON, GAIL R. JOHNSON & MELISSA JOHNSON WILLIAMS, *ALL WERE NOT HEROES: A STUDY OF THE LIST OF U.S. SOLDIERS EXECUTED BY U.S. MILITARY AUTHORITIES DURING THE LATE WAR* (1997); GEORGE S. BURKHARDT, *CONFEDERATE RAGE, YANKEE WRATH: NO QUARTER IN THE CIVIL WAR* 47 (Carbondale, IL: Southern Illinois University Press, 2007).

⁴³⁷ JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 46 (Boston: Northeastern University Press, 1997); Bessler, *Revisiting Beccaria's Vision*, *supra* note 95, at 55.

great-hearted Italian who did so much for humanity?” he asked his fellow Americans, also inquiring: “where are the monuments to the man who did most to prevent unmerited sorrow, and who stands almost first among the victors in the age-long struggle for human happiness versus the brutal and unfeeling laws which had for so long maddened men with their infernal tortures?”⁴³⁸

But during the American Revolution, during America’s earliest and formative years, and long before Union and Confederate forces met on battlefields at places like Gettysburg, Beccaria’s humane influence spread far and wide. *On Crimes and Punishments* changed American law for the better, and the founders’ embrace of Beccaria’s ideas not only ameliorated the severity of the English common law, but encouraged the use of written constitutions and codes that were less arbitrary in nature. With the Civil War now 150 years in the rear-view mirror, it is possible that Beccaria’s ideas on crimes and punishments, preserved in his writings, may still influence the future of American law. Beccaria’s name is still invoked from time to time,⁴³⁹ and the Beccarian impulse is one that

⁴³⁸ Rev. Thomas B. Gregory, “Caesar Bonesana Beccaria,” EL PASO HERALD (El Paso, TX), Apr. 24, 1912, p. 18; Rev. T. B. Gregory, “Becarria” [sic], THE SALT LAKE TRIBUNE (Salt Lake City, Utah), Apr. 7, 1912, p. 49. Cesare Beccaria’s ideas, since their first appearance, have shaped societies and laws around the globe. See John D. Bessler, *The Economist and the Enlightenment: How Cesare Beccaria Changed Western Civilization*, EUR. J. LAW ECON., Vol. 42, No. 2, available at DOI 10.1007/s10657-016-9546-z.

⁴³⁹ E.g., “Finds Study of Crime Rich with Information,” THE BRIDGEPORT POST (Bridgeport, CT), Nov. 10, 1963, p. 50 (“Cesare Bonesana, Marchese di Beccaria (1738-1794) authored the ‘Treatise on Crimes and Punishment’ in which he pioneered new concepts in the reform of criminal justice and capital punishment.”); “Church and the Death Penalty,” PANAMA CITY NEWS-HERALD (Panama City, FL), Dec. 4, 1976, p. 28 (“The death penalty cheapens all life and teaches brutality. ‘Back in 1764,’ noted Bishop Durick, ‘a wise and compassionate Christian lawyer in Italy, Cesare Bonesana Beccaria, made the first great plea for an end to capital punishment.’”); Kenneth L. Davis, “Capital Punishment Around World,” GREELEY DAILY TRIBUNE (Greeley, CO), May 19, 1970, p. 3 (“Cesare Bonesana Beccaria, 18th century Italian jurist and economist, started the

gravitates toward a more rationale—and less arbitrary—criminal justice system. Perhaps one day, maybe sooner than later, Beccaria’s humane vision may yet lead to the abolition of capital punishment throughout the country. If that day comes, it would bring to fruition the humane vision of Beccaria that the Founding Fathers, in their own time, and in their own way, imbibed as part of their quest for a more enlightened society.

swing away from death with his anonymous ‘Of Crime and Punishment.’”). In *State v. Santiago*, 122 A.3d 1 (Conn. 2015), the Connecticut Supreme Court declared that state’s death penalty unconstitutional. In doing so, it held that “the eighth amendment is offended not only by the random or arbitrary imposition of the death penalty, but also by the greater evils of racial discrimination and other forms of pernicious bias in the selection of who will be executed.” *Id.* at 19. In that case, the Connecticut Supreme Court specifically noted that, in 1786, the *New Haven Gazette* “reprinted Cesare Beccaria’s entire 1764 treatise ‘On Crimes and Punishments,’ a seminal Enlightenment era work that condemned torture and the death penalty, and that led to widespread questioning of the latter throughout Europe and the United States.” *Id.* at 38. In a recent dissent in *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting), Justice Stephen Breyer—joined by Justice Ruth Bader Ginsburg—also concluded that it is “highly likely that the death penalty violates the Eighth Amendment.” JUSTICE STEPHEN BREYER, *AGAINST THE DEATH PENALTY* 96 (Washington, DC: Brookings Institution Press, 2016). A large number of countries around the world have already abolished the death penalty, and perspectives on capital punishment are changing rapidly in the modern era. Whereas Beccaria, in 1764, wrote about torture and capital punishment in separate chapters, *non-lethal* acts, including *mock* or simulated executions, are already considered to be acts of torture under international law. If mock executions qualify as torture (and properly so), real executions—it is submitted—should qualify as such, too. See JOHN D. BESSLER, *THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION* (forthcoming from Carolina Academic Press in 2017).